

ESA—HABITAT CONSERVATION

OVERSIGHT HEARING BEFORE THE COMMITTEE ON RESOURCES HOUSE OF REPRESENTATIVES ONE HUNDRED FOURTH CONGRESS SECOND SESSION ON

THE ENDANGERED SPECIES ACT WITH REGARD TO SECTION 10(a) PERMITS (HABITAT CONSERVATION PLANS) AND OTHER INCENTIVES

JULY 24, 1996

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ESA—HABITAT CONSERVATION

WEDNESDAY, JULY 24, 1996

HOUSE OF REPRESENTATIVES,
COMMITTEE ON RESOURCES,
Washington, DC.

The Committee met, pursuant to call, at 2:10 p.m., in room 1324, Longworth House Office Building, Hon. Richard W. Pombo presiding.

STATEMENT OF HON. RICHARD W. POMBO, A U.S. REPRESENTATIVE FROM CALIFORNIA

Mr. POMBO. We're going to call this hearing to order.

I am going to ask unanimous consent that my opening statement be included in the record. I know that Mr. Smith has another appointment that he has to attend, but I wanted to go ahead and start with him.

I would also like to ask unanimous consent that the opening statement of Congressman Hastings be included in the record, and I will yield to him at this time.

Mr. HASTINGS. Thank you, Mr. Chairman.

I would also like to have unanimous consent, if that's necessary, to submit questions for the witnesses of a subsequent panel. I have a conference committee that I have to go to and so I won't be able to be here. I would like to have that entered into the record.

Mr. POMBO. Without objection.

Mr. POMBO. Also, I would ask unanimous consent that Mr. Young's opening statement be included as well.

[The statements of Members follow:]

STATEMENT OF HON. DON. YOUNG, A U.S. REPRESENTATIVE FROM ALASKA; AND CHAIRMAN, COMMITTEE ON RESOURCES

Good afternoon. I welcome all of you to this oversight hearing of the Committee on Resources on the implementation of the Endangered Species Act. This afternoon we will focus our attention on two of the most recent efforts of the Fish and Wildlife Service to implement the ESA. When I originally voted for the ESA in 1973, most of the Members of this Congress believed that we were protecting endangered and threatened species from intentional acts of humans to bring harm to these creatures. We did not wish to see wildlife and plants disappear from this earth because of the carelessness and wastefulness of some people. However, few of us realized that the law would be so broadly interpreted as to be able to bring farming, home building, ranching, timber harvesting, and other essential life sustaining activities to a halt.

By 1982, we realized that there must be some procedure whereby these activities that are so important to human well being should be allowed to continue, even in some cases where it might result in the inadvertent taking of a listed species. So in 1982 Congress adopted Section 10(a) of the ESA to allow the Secretary to issue Incidental Take Permits, which allow these important activities to continue. However, the authority to issue permits was immediately challenged in the courts by

those who wish to stop these activities. Until recently very few permits have been issued.

During the last several months, the Secretary of the Interior has announced a flurry of activity, issuing a large number of permits. If the Secretary is to be believed, we are seeing a new era of cooperation and landuser friendly policies. However, reports that the environmental community plans to challenge some of these permits have been published and notices of intent to sue have been served upon the Secretary. If these suits are successful, these HCP's could be ruled illegal and we are back where we started.

Since this is a significant change in policy by the Fish and Wildlife Service, I believe it is important that the American people be fully informed regarding how the policy will work or not work as the case may be and that the people have a voice in how this policy is implemented. It is clear that the model adopted by the Service for Habitat Conservation Planning will not work in many areas of the country and will not solve the problems of the small individual landowner.

According to the information sent to us by Mr. Frampton, the land area covered by either current or proposed HCP's is approximately 5.4 million acres or an area larger than the State of Massachusetts. This brings all of this land under intense Federal regulation and control.

I am concerned that the public is being led to believe that their ESA problems are being resolved when, in fact, the conflicts are being postponed until some future date.

I have to say that in many ways the Fish and Wildlife Service has moved in our direction, adopting at least in theory, some of the principles that have been advocated both in this Congress and in the previous Congress by many of the conservatives of this Committee, including Mr. Pombo, Mr. Tauzin, and many others. The devil is always in the details and the one true difference between our conservative approach and the approach taken by the Administration is that the Administration approach is based on a massive land preservation and set aside program that will not work, either for people or for wildlife. Some of the landowners covered by the agreements are willing owners but others have been included against their will. Our approach starts with the basic principle that private property rights must be respected and the civil rights of our citizens must be guaranteed.

If we are to solve the problems associated with the ESA, there must be a comprehensive and credible reform of the act. It must respect private property rights, balance human needs with resource protection, and minimize the costs to local governments and the States. It must also insure that our natural resources are wisely protected and conserved. If not, we will be here year after year debating these same issues over and over again. I am confident that we will be able to complete a comprehensive reform that will accomplish the goals of the ESA in the upcoming Congress away from the heat and rhetoric of an election year.

STATEMENT OF HON. JIM SAXTON, A U.S. REPRESENTATIVE FROM NEW JERSEY

Thank you, Mr. Chairman, for providing this opportunity to examine the purposes and possibilities of the Habitat Conservation Plans.

Habitat Conservation Plans are a useful tool in the fight to reconcile the competing needs between species and property owners. Habitat Conservation Plans may not be the absolute answer to all of our Endangered Species problems. In fact, we must remember that they are only one tool of many we will need to incorporate in order to achieve some balance between the land uses of species and people.

There are some divergent points of view represented here today. I hope that we will be able to determine the ways by which Habitat Conservation Plans and other tools can be used to improve the ways the Endangered Species Act works on the ground.

Thank you for coming to Washington to testify on this important subject. This should be very informative.

Mr. POMBO. Mr. Dooley, do you have an opening statement?

Mr. DOOLEY. No, Mr. Chairman.

Mr. POMBO. If there are no opening statements, I would like to turn to our colleague, Congressman Smith from Texas, who will start as the first panel.

**STATEMENT OF HON. LAMAR SMITH, A U.S. REPRESENTATIVE
FROM TEXAS**

Mr. SMITH. Thank you, Mr. Chairman.

Chairman Pombo and other members of the Committee who are here, thank you for inviting me to testify about the use of habitat conservation plans under the Endangered Species Act.

Before we even consider habitat conservation plans, though, it's important to remember the context of this hearing. This hearing has been called because there's a broad consensus that the Endangered Species Act is broken. The Committee has recognized this broad consensus and worked to reform and improve the Endangered Species Act. Some in the administration who have opposed these common sense endangered species reforms claim that habitat conservation plans, or HCPs, are an alternative.

The Balcones Canyonland Plan, or BCP, provides a good example of how habitat conservation plans cannot and do not fix the broken Endangered Species Act. In order to illustrate how the BCP fails both landowners and nature, I would like to recount the story of a constituent of mine, Margaret Rector. Margaret Rector is a 74 year old Texan who purchased 15 acres outside of Austin in order to retire. In 1989, her property was assessed at a taxable value of \$991,000. Shortly after this assessment, the Fish and Wildlife Service added the golden-cheeked warbler to its list of endangered species.

This listing prohibited Margaret Rector from any productive uses of her property that would alter her land without a Section 10(a) permit from Federal officials. Obtaining this permit is highly uncertain and expensive. In six years, her property value has diminished from \$991,000 to \$30,000, and under the current Endangered Species Act, Margaret Rector was denied compensation.

The Endangered Species Act is not just bad news for landowners like Margaret Rector. It harms the golden-cheeked warbler and black-capped vireo as well, species it was supposed to protect. Margaret Rector's story tells why the Texas Department of Natural Resources found that listing these rare birds increased rather than decreased the clearing of their habitat. It provides perverse incentives that discourage rational farmers, ranchers, or homeowners from good environmental land management.

Some claim that the habitat conservation plans like the BCP fix these problems with the Endangered Species Act, that they provide fairness and flexibility to landowners like Mrs. Rector and improve conservation of species like the golden-cheeked warbler. But close examination shows that BCP does not correct these problems and that they create a whole new class of endangered landowners.

Under the BCP, Margaret Rector would be permitted to use her 15 acres only if she paid a "mitigation fee" of \$5,500 per acre, or \$82,500 to use her own private property. In Washington, this may be called fairness or flexibility. But in Texas, it's called extortion.

Requiring landowners to pay a fee as a condition to use private property violates the Fifth Amendment to the Constitution. This is private property, Mr. Chairman. It is owned by Margaret Rector, not the Federal Government, not the Department of Interior.

Requiring landowners to pay a fee to use private property won't correct the perverse incentives in the Act, either. If a landowner

knows that a rare plant or animal will cost \$5,500 per acre if discovered, that's hardly an impetus for good management.

What's worse, the BCP creates an entirely new class of endangered landowners in Texas—folks whose property lies within the BCP preserve. The mitigation fee will be imposed on property owners outside the preserve so that the BCP can acquire other lands to be preserved. But these fees will generate enough revenue to compensate these landowners only if land can be acquired at approximately \$5–6,000 an acre. Later in this hearing, you will be hearing testimony from Thomas Kam that landowners estimate the value of preserve property at \$28,000 per acre.

Many landowners reject paying this mitigation fee to the government. Rather than pay the government a fee to develop their own property, they're willing to roll the dice and apply for a Section 10(a) permit, which as I said a few minutes ago can take many, many years and cost thousands of dollars. Landowners whose land lies within the BCP can hardly be assured of compensation. Rather than a sure, certain guaranty for landowners like Margaret Rector and Thomas Kam, the BCP appears a financial house of cards waiting to collapse on all involved.

In addition to being unfair to landowners and financially insecure, BCP represents "Washington knows best" arrogance at its worst. In 1993, the voters of Travis County, which is where Austin is located, rejected a bond issue to pay for this project. These voters understand that conservation is important, but so are new schools, police protection, and other public services. The voters of Travis County have spoken. The BCP ignores their wishes entirely.

Finally, the questions and doubts that I raise about the BCP have been advanced before. Unfortunately, these concerns have been unheeded. Even though BCP affects landowners more than any other group, the landowners played only a minor role in the BCP's development.

Mr. Chairman, there is no substitute for real Endangered Species Act reform. I know that you agree with me on that. Fairness to landowners like Margaret Rector demands it, protection of rare plants and animals mandates it, and the Constitution requires it.

But HCPs do not provide real reform. Real Endangered Species Act reform can only be through measures that restore protection for private property rights. HCPs such as the BCP do not restore or protect private property rights. They just return those rights to landowners like Margaret Rector in exchange for a ransom.

Mr. Chairman, I thank you again for inviting me and allowing me to be here today, and I appreciate not only the opportunity to testify but also to say to you how much I have appreciated your support on this issue over the years and how much you've been a leader on this issue.

Mr. POMBO. I thank you. I just have a couple of questions for you.

In your statement you said that landowners played a minor role in the development of the BCP. Can you expand on that a little bit?

Mr. SMITH. Yes. And there's really two responses to give you.

First of all, the landowners who own the property within the preserve many times and most often were never consulted, never notified, didn't know what was going on, and now suddenly they're in

the position of a "Hobson's Choice", which is your choice is either to pay \$5,500 an acre or your choice is to go through a long, lengthy and expensive permit process.

That's no choice at all. That's a choice between being in the fire and being in the frying pan. Of course, what we would like to do is raise a third choice and say that perhaps the best solution, the best way to be flexible, is to amend the Endangered Species Act and get back to the original intent and inject some common sense into its enforcement.

If I may, Mr. Chairman, I would like to add also that this so-called solution that the Federal Government has come up with, which is we're either going to force you to pay \$5,500 an acre or go through the long and expensive permit process, all this does is encourage the Federal Government to declare even more land, more acres, as endangered habitat, so that they will be able to extract even more money from the private property owners to perpetuate this scheme of forcing the private property owners to buy property elsewhere. So the incentives are all wrong.

That's a lengthy answer. The other part of the answer is that the taxpayers, who were consulted, actually voted against this plan, and their wishes are being ignored and the rights of private property owners are being ignored as well.

Mr. POMBO. How would the proposed five-acre exemption be impacted on a plan such as this one?

Mr. SMITH. I know the administration has made that proposal, and it's interesting that they—well, they have made it in this election year. We never heard anything about that when 19 of my 21 counties in the 21st District were declared as possible critical habitat.

But that, to me, is still not the answer. It is still carving out just a small number of individuals. I'm not here to brag, but in Texas, five acres doesn't take you too far when you're a rancher or a farmer. So five acres is really only addressing a small fraction of the problem, and it's also dividing the private property owners and creating different classes. I don't think that's part of the solution, either.

Mr. POMBO. Thank you.

Mr. Dooley, do you have any questions?

Mr. DOOLEY. No questions.

Mr. POMBO. Mrs. Chenoweth?

Mrs. CHENOWETH. No, Mr. Chairman.

Mr. POMBO. Mr. Metcalf?

Mr. METCALF. No questions, Mr. Chairman.

Mr. POMBO. Thank you very much for your testimony, and if there are any further questions that anyone has for you, I will have them submitted to you in writing.

Mr. SMITH. Thank you, Mr. Chairman.

Mr. POMBO. Thank you.

Mrs. CHENOWETH. Mr. Chairman, I do have a statement I would like to enter into the record.

Mr. POMBO. Without objection, that will occur in the record.

[Prepared statement of Hon. Helen Chenoweth follows:]

STATEMENT OF HON. HELEN CHENOWETH, A U.S. REPRESENTATIVE FROM IDAHO

Mr. Chairman, thank you for holding this hearing on Habitat Conservation Plans (HCP) performed pursuant to the Endangered Species Act (ESA). This is an extremely important issue to my constituents, and I am very much looking forward to hearing from our panelists.

I want to extend a warm welcome to Mr. David Wilson from Ketchum, Idaho. David has come a long way to be here today and will be testifying on behalf of the National Association of Home Builders. I look forward to hearing from him.

Mr. Chairman, the Endangered Species Act has had a profound impact on the economy of the western United States. In literal terms, family owned businesses have been forced to shut down. From 1993 through 1995, 66 timber mills were forced to close down in Oregon, California and Washington, alone. The nationwide impact has been equally severe.

As ESA was first applied, if a threatened or endangered species were found on private property, a landowner's only option was to abandon or limit his use of the property, or risk civil and criminal prosecution under the Act. As a result, many landowners have been taking preemptive measures to prevent the accumulation of habitat on their property.

Fortunately, Congress added Section 10(a) to the ESA, which authorizes the U.S. Fish and Wildlife Service (USFWS) to issue an incidental take permit to private property owners allowing them to incidentally "take" listed species as a result of otherwise lawful activities, provided the applicant meets certain requirements. One of those requirements is the submission of a "conservation plan" that seeks to minimize and mitigate all impacts on the species. The USFWS now calls these "Habitat Conservation Plans" (HCPs).

Although HCPs are a step in the right direction, Mr. Chairman, I am gravely concerned that the cost of preparing an HCP is prohibitive to many small businesses. Major plans can take years and millions of dollars to finalize, with private landowners bearing most of the costs. These enormous costs and delays associated with the HCP process make this otherwise attractive ESA option impossible for small businesses. The result is that only large, wealthy companies are able to take advantage of Section 10 HCPs.

Mr. Chairman, I hope that the Members here today will be willing to find a solution to the detrimental impacts the ESA is having on our small business men and women. Having already taken steps to lessen the ESA's regulatory burden on large corporations, it is now time to do the same for small businesses.

With that being said, Mr. Chairman, I look forward to hearing from our witnesses.

Mr. POMBO. I would like to call up the second panel, Mr. George Frampton, Ms. Kimberley Walley, Mr. Thomas Kam, and Mr. David Wilson.

Thank you all very much for joining us here today. I would like to start with Mr. George Frampton, who is the Assistant Secretary, Fish, Wildlife and Parks, from the Department of Interior.

Mr. Frampton, you know all about the lights and everything else, so you can begin.

STATEMENT OF GEORGE T. FRAMPTON, JR., ASSISTANT SECRETARY FOR FISH AND WILDLIFE AND PARKS, DEPARTMENT OF THE INTERIOR

Mr. FRAMPTON. Thank you, Mr. Chairman.

I am delighted to have an opportunity to talk this afternoon about what I think is one of the most successful initiatives of the Clinton Administration, which is our efforts over the last three-and-a-half years to pioneer the use of habitat conservation plans and similar voluntary agreements in which we bring together private landowners, developers, local and county governments, State government, Federal and State agencies, the development community, environmentalists and nonprofits, in a collaborative way to design long-term, individual or multi-species plans that both provide quite a bit more protection in many cases for species than we

would be able to obtain through regulation, and also a tremendous amount of certainty and predictability for developers.

I think that this initiative is really a blueprint for the future because it enables us to go beyond regulation into the consensus-based protection process and provide relief and certainty for the landowner and developer community at the same time.

Just to summarize a few of the areas in which we have active HCP programs, in the Pacific Northwest we have negotiated almost a dozen and have in the pipeline several more dozen habitat conservation plans with major timber companies, and with the States of Oregon and Washington.

We recently concluded a habitat conservation plan with the Plum Creek Timber Company in the I-90 corridor—you're going to hear about that later today, 170,000 acres of their land. You're going to have testimony from Plum Creek.

I have also, Mr. Chairman, letters here on two of the other recent HCPs that we've concluded, a habitat plan with the Murray Pacific Corporation, and one just last week with Port Blakely Tree Farms in Washington. Toby Murray, who is the VP of Murray Pacific, and the chairman and general partner of Port Blakely Tree Farms, have written letters which I would ask be included in the record, expressing their support for this process.

Mr. POMBO. Without objection.

[The letters may be found at the end of hearing.]

Mr. FRAMPTON. Thank you, Mr. Chairman.

In the last year we have concluded major agreements with Clark County, NV—that's Las Vegas—and Washington County, UT, which is St. George, two of the fastest growing parts of the country to protect the desert tortoise. We had the Balcones plan in May, in Austin, 633,000 acres. Contrary to the Congressman's testimony, that is a plan that has the support of the City of Austin, Travis County, who applied for the "incidental take" permit. It has taken a long time. I'm surprised that he didn't come to admit that he was wrong about this in his opposition to this collaborative process over the last few years.

In Florida, in the southeast, we have had numerous agreements with timber companies. You're going to hear about one of those later this afternoon from International Paper, who has been a good partner in the southeast with cooperative agreements and habitat conservation plans.

Finally, particularly in Southern California, a good deal of the open space remaining between Los Angeles and San Diego, Mr. Chairman, is being planned right now by a collaborative group of city, county and State officials, large landowners and developers, environmental groups and scientists. We have initialed two of those major plans in the last few months, the most recent in Orange County involving more than 208,000 acres, a good deal of the open space remaining in Orange County, CA.

The one point I guess I want to make in my oral testimony is that there have been people who have said this is a very forward-looking and progressive way to approach species protection, by bringing stakeholders to the table and reaching these agreements, and that's great for State and local government and for large landowners because they can afford it. Indeed, if you have agreements

covering hundreds of thousands or millions of acres for 25 or 50 years, you would hope that some time, money and good science goes into that.

But what about the little guy? Is this workable for the small landowner? The answer is that in the last year, year and a half, I think we have made a lot of progress in beginning to make the habitat conservation planning process available also, and useful to and for the smaller landowner.

For example, in the Balcones HCP, basically the county issues a certificate of participation. A small landowner can join the program—it takes about two or three weeks—pay a mitigation fee if it's high-grade habitat that's going to be developed, and basically join the program without doing an individual HCP.

In Georgia is another example of how we're trying to make these plans work for small landowners. In Georgia, we are about to conclude a statewide agreement on the red-cockaded woodpecker with the State Fish and Wildlife and DNR. The State then will take the rules that we negotiate and step them down into State regulation, so that as long as a private landowner lives with those rules, the private landowner, in effect, has enrolled for free and with no process in a statewide HCP, and we hope that most of the other southern States with woodpecker habitat will follow along behind that.

"No take" MOUs, our safe harbor umbrella agreements, where individual landowners sign on without doing individual plans, and the handbook that we are about to bring out in the next month or two for low impact HCPs, are all additional ways in which we're making a streamlined process available to the small landowner. So I would say we're a year to a year and a half behind designing new ways to do this for the little guy, but the HCP and MOU process that we've pioneered I think is going to be, in the near future, just as useful for small landowners as large landowners.

Thank you, Mr. Chairman.

[Prepared statement of Mr. George T. Frampton, with attachments, may be found at the end of hearing.]

Mr. POMBO. Thank you.

Ms. Walley?

STATEMENT OF KIMBERLEY K. WALLEY, ESQ., ON BEHALF OF THE BIODIVERSITY LEGAL FOUNDATION

Ms. WALLEY. Good afternoon.

My name is Kimberley Walley and I'm an attorney with the law firm of Meyer & Glitzenstein, which represents a number of conservation groups that have recently sent a 60-day notice letter to the U.S. Fish and Wildlife Service and the National Marine Fisheries Service contending that the "no surprises" policy violates the Endangered Species Act.

On behalf of the Biodiversity Legal Foundation, one of the groups that sent the notice letter, I have been asked to testify as to why we believe the current "no surprises" policy violates ESA. I will touch upon some of the major reasons why the BLF believes this policy is deeply flawed, and then offer a couple of suggestions. The policy hasn't been discussed at this point, and so I will just give a brief overview of what it is.

Essentially what it means is when the Fish and Wildlife Service or National Marine Fisheries Service comes to the table to negotiate a habitat conservation plan, they will offer up general assurances to the landowner. Those assurances basically are, once you've entered into an HCP and you have committed to mitigation measures, no further money or land will be required of you, and essentially the Services bear the burden of any additional mitigation measures that may be required after the plan has been entered into.

Let's say, after the plan has been entered into, they find out that, we need to do something extra to prevent a species' extinction, the species that's covered under the plan. It's the Service that bears the burden of then implementing those needed mitigation measures.

The Service will definitely have to pay for the additional mitigation measures, and one of those things would be possibly purchasing the land that the additional mitigation measures are needed to be imposed upon.

That actually leads to one of the problems that we see with this policy, that there is absolutely no provision in there that shows there's any kind of funding mechanism or money available for the Service to be able to pay for these additional mitigation measures. As we all know, the Service is under tight budgetary constraints. They're having problems even listing endangered and threatened species. So there is no guarantee that they would even be able to pay for these additional mitigation measures as they arise.

Now, this "no surprises" policy has been in effect since August of '94, and has been applied to HCPs that have come out since then. Some of them are the Plum Creek Timber Company's HCP, which the permit that was issued has a duration of approximately 50 years and covers 170,000 acres, and purports to adequately protect 286 species.

Another HCP that contains the "no surprises" policy is the Central and Coastal Subregion NCCP HCP down in Orange County, CA, that was just signed by Secretary Babbitt. That HCP has a duration of 75 years, covering 47 species, and over 200 acres of land.

I'm just going to talk about three problems that we see with this "no surprises" policy. The first is, as 164 scientists have said in a letter that I have attached to my testimony, a letter to Senator Chafee and Congressman Saxton, the "no surprises" policy basically ignores ecological reality and rejects the scientific knowledge and judgment of our era. Essentially, the "no surprises" policy ignores the fact that biological circumstances change, such as fires and disease, those things that arise that cause changed circumstances over the duration of a permit period, especially when you think about these permits lasting between 30 to 75 years.

Other changes that may occur include political changes and social changes. A good example is the fact that just last year a salvage timber rider was passed that changed circumstances for HCPs that were entered into up in the Pacific Northwest. All of this is further exacerbated by the fact that many of the species that are covered in these HCPs and are given "no surprises" guarantees are species that are unlisted, candidate species, species that the Serv-

ice has absolutely little to no scientific information about the habitat needs of these species. So how can they enter into these "no surprises" assurances that these habitat conservation plans are adequately protecting them over 75 years? They don't have any scientific information about the habitat requirements of these species.

This leads me to a second problem, which Dr. Soule, one of the leading conservation biologists in this country, stated in another letter to Senate Chafee and Congressman Saxton. This policy essentially closes the door to adaptive management. Adaptive management being that, as circumstances change, you need to go back and reexamine what's been done and adapt in order to preserve the species.

An example of that would be, if you assume when you're entering into a habitat conservation plan you need to do "x" to preserve a species, and ten years down the road you realize "oh, no, I can't do 'x'; it has to be 'y'", you would have to go back and be able to adapt.

Now, the last problem we have with this is the fact that it's a mandatory policy rather than a discretionary policy. This means that when the Fish and Wildlife Service comes to the table and enters into negotiations, they have to give these assurances to every landowner that asks them, and every landowner, obviously, is going to be asking for these assurances. This gives away a major bargaining chip for the Fish and Wildlife Service and actually, in a kind of perverse way, causes problems for the landowner. Because if a Fish and Wildlife Service biologist comes to the table and realizes they're going to be entering into a habitat conservation plan that lasts 75 years, and the mitigation measures that are in there are going to have to last for the duration of 75 years, and it's going to be very hard to change the mitigation measures in a plan, they may front-load the process, essentially requiring more at that period of time than may actually be necessary.

Now, if I may be allowed, I'm just going to make two small suggestions to the current policy.

One is that the policy not be mandatory, that instead it be discretionary, that it be done on a case-by-case basis. Essentially, you have to realize that you've got to look at the circumstances that arise and then assess whether we can give these kinds of assurances to the landowner; do we have the science to be able to back this up?

Secondly, you cannot give ironclad guarantees in these kinds of circumstances. An HCP may need to be modified if the Service can show that unanticipated circumstances have arisen. It's kind of a reopener provision, which is very similar to what's been used in the Superfund, in CERCLA agreements, in that if new information comes up, you're going to have to go back and look at it again.

For example, if you have a water permit and a factory says we're going to discharge "x" amount of pollutant into the river, and the EPA says OK, you can do that, and ten years later they discover that we didn't know it at the time but this is causing a great public health hazard, it's not unusual that the EPA would then go back and say we need to renegotiate this because of new information that has arisen.

Essentially what I'm trying to say here is that we believe the "no surprises" policy is deeply, deeply flawed. It does not take into con-

sideration some of the most basic biological principles, that nature is anything but predictable. It fails to allow for the incorporation of the best scientific information, and it gives away one of the Service's major bargaining chips. Therefore, we recommend that this policy not be incorporated into the reauthorization of the Endangered Species Act.

Thank you very much.

[Prepared statement of Ms. Kimberly K. Walley may be found at the end of hearing.]

Mr. POMBO. Thank you very much.

You heard all the bells going off. We have a vote and I'm going to have to apologize because we're going to have to recess the hearing. There are four votes on the Floor, so it's going to take us about 30 minutes to get through that.

I know Mr. Frampton didn't have anything else he wanted to do this afternoon. So we're going to recess the hearing, and as soon as we can get back, we will. I have to apologize, but I can't control the votes. We will be back as soon as we can.

Mr. FRAMPTON. I'll await you eagerly, Mr. Chairman.

Mr. POMBO. The hearing is recessed.

[Recess.]

Mr. POMBO. We're going to call the hearing back to order. Again, I apologize to our witnesses for the delay.

We will go ahead and have Mr. Thomas Kam begin his statement.

STATEMENT OF THOMAS KAM, ON BEHALF OF BCEP PARK LANDOWNERS ASSOCIATION

Mr. KAM. Thank you, Mr. Chairman. My name is Thomas Kam. I'm a small landowner and I run a small practicing structural engineering firm in Austin, TX.

In May of this year, U.S. Fish and Wildlife granted a 10(a) permit to the City of Austin and Travis County with the published intent of creating a preserve on the west side of the City of Austin for several birds which are alleged to be endangered. The plan will grant the city and the county an area wide 10(a) permit from Fish and Wildlife and places them in the Federal law and administration business (just what the City of Austin needs to be).

The plan's intent is to create multiple blocks of land totaling approximately 30,000 acres on the western edge of Austin. This is in addition to another federally funded preserve, intended for the identical purpose, of 45,000 acres immediately west of the BCP, also located in Travis County, noted as the Balcones Canyonland National Wildlife Refuge.

Approximately 20,500 acres have already been purchased and acquired by government entities and conservation/real estate organizations for the BCP preserve. The balance of 9,500 acres to be acquired is currently privately owned. Many of these tracts have been in families for multiple generations.

The plan proposes to acquire the remaining private land with a mitigation/extortion payment tax of \$1,500 to \$5,500 per acre on the land, with habitat, around the designated preserve. In addition to this fee, 100 percent of the increase in future Travis County

property tax revenue from the developed land will be diverted for continued land acquisition.

As Mr. Lamar Smith pointed out earlier, the voters of Travis County actually voted down the bonds to acquire the land, but the County Commissioners circumvented the voters and created this bogus scheme to take tax revenue out and buy land.

The plan authors have "hip shot" that this acquisition procedure will take up to 20 years, and that the average land acquisition cost will be \$5-6,000 per acre. There has been some discussion that it may take 30 years or more to acquire the balance of the preserve.

Despite actually nine years of work on a plan, the Fish and Wildlife Service, the State of Texas, Travis County, the City of Austin, nor the Texas Nature Conservancy have ever instigated or produced a professional appraisal or cost survey for the acquisition of the balance of 9,500 acres. There is no professional basis for the projected land acquisition cost of \$5-6,000 per acre.

As a direct result of this failure to provide a professional cost survey for acquisition, I initiated a survey, completed in the spring of 1995, of the current private landowners within the proposed preserve. This survey showed that only one-third of the private landowners were willing to sell, and that the average willing sales price, based on a summer of '95 closing, was \$28,600 per acre.

I need to point out here that this land is immediately adjacent to urban and suburban development. This is not out in the boondocks. The eastern boundary of this land that they want to acquire is two to three miles east of the western boundary of the city limits of Austin.

The city, county, and Federal Government land cost estimate per acre is off by a factor of five, at least five.

While the city has acquired distressed RTC property for as little as \$1,500 per acre, it has paid \$20,000 to over \$100,000 per acre for privately owned tracts in the preserve boundary within the last 11 years. The landowners willing to sell asking price of \$28,600 per acre is supported by closed sales and very defensible in a condemnation court.

This private landowner survey was presented to and essentially ignored by the City Council, the Commissioners Court, U.S. Fish and Wildlife, and the working committee of the BCP. These government entities have produced no other surveys or appraisals of any type or kind. Based on the landowner survey of \$28,600 per acre, and the 9,500 acre acquisition, the cost for this plan could be over \$271 million.

Over the last eight years, numerous tracts in the bird habitat area have received "bird letters", which effectively release them from any liability. In addition, many tracts are already developed, have completed individual 10(a) permits for their tracts, or are undevelopable due to access and terrain. The remaining land that is not in the preserve that can be taxed/extorted is very limited. Of the few remaining larger tracts, it will be more economical to do an individual 10(a) permit rather than participate in the BCP per acre extortion fees.

I have repeatedly requested from Fish and Wildlife and Travis County a list of tracts which they can effectively tax in order to determine the potential income from their extortion fee. They have

responded that they have not done this study and have no intention to do so, and they are not required by law to do this. They have no idea how much projected income they will receive.

From May 2nd to July 10th of this year, the county has issued only one permit with a total fee of \$1,500 under this plan. This doesn't even cover a fraction of the overhead cost for the county.

A 30,000 acre block of land west of town in government control will no doubt be beneficial to some special interest groups. This is being publicly touted by local officials as "Austin's Central Park." This reflects the true intent of this process: the creation of an urban park at little or no expense to the city or county by using a Federal program that creates an insurmountable encumbrance on the land, effectively removing it from the marketplace and condemning it without compensation.

The Fish and Wildlife Service is also a beneficiary, as they show the creation of a preserve at no cost to the Federal Government. Everyone appears to be a winner, except the landowners, lenders, and the lienholders, who pay the exorbitant tax to get their land released, or the extremely unfortunate landowner/lender whose property is within the preserve, where it is locked away in a dead zone where the land cannot be used for production or collateralized for a loan.

Through the entire eight-year process, the local and Federal Government agencies effectively stacked the local committees set up to review the Fish and Wildlife plan with bureaucrats and lobbyists, with only occasional minority nonpreserve landowner representation. Every nonpreserve landowner representative always objected vehemently to the plan, and his or her comments were summarily rejected by the committee.

There has never been a preserve landowner or lender on any committee for the BCP. All preserve landowners input was summarily rejected or ignored.

The plan finances are nonprofessional, unsubstantiated, and will fail to generate the required income. This is, however, not a problem, as the plan ensures that there will be no resolution and that the land remains effectively locked up in the desired State at no cost to the government.

The landowners for all the habitat land within and around the preserve have been severely penalized simply because we have maintained our land in a condition favorable to the alleged endangered birds.

Mr. POMBO. Mr. Kam, I'm going to have to ask you to wrap it up.

Mr. KAM. OK.

Most of the city and county residents who will derive benefit from the preserve as parkland have been exempted from significant financial responsibility as a result of this plan.

Again, this plan unjustly penalizes and burdens the landowners whose sole distinguishing trait is maintaining their land in a condition suitable for the birds.

As a property owner within the preserve, I and my neighbors have effectively lost the actual use and collateral value of our land, with no compensation and no realistic expectation of compensation because of this HCP.

A couple of other things I would like to point out. Mr. Frampton is apparently not aware, that his statement of a voluntary agreement is totally false in this case. There was no voluntary agreement on any landowner to be a part of this plan. This plan was imposed, not agreed to.

Thank you, Mr. Chairman.

[Prepared statment of Mr. Thomas Kam may be found at the end of hearing.]

Mr. POMBO. When we get to the questions part, I'm going to ask you about that specifically.

We do have another vote on the Floor, on final passage of this particular bill. I'm going to recess the Committee very briefly and go vote, and then we'll be right back. This will be a very brief recess.

[Recess.]

Mr. POMBO. Again I apologize for the delay. I moved as fast as I could.

Mr. Wilson, you may begin.

STATEMENT OF DAVID WILSON, MEMBER, ESA WORKING GROUP, ON BEHALF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS

Mr. WILSON. Thank you, Mr. Chairman.

My name is David Wilson and I'm a home builder from Ketchum, ID. I also serve on the National Association of Home Builders' Endangered Species Act working group and its government affairs committee. On behalf of the 185,000 member firms of the National Association of Home Builders, thank you for the opportunity to testify.

You have asked my views on two issues: the Fish and Wildlife's "no surprises" policy, issued in August of 1994, and the regulation creating the five-acre exemption for threatened species. I would like to address the "no surprises" policy first. In my opinion, while "no surprises" is an attempt by the administration to correct many of the difficulties landowners face, in reality it is nothing more than a good sound bite. It lacks the force of law to make it truly useful to landowners.

As you know, under the Endangered Species Act, Section 10(a) permits require the development of a habitat conservation plan. Unfortunately, the Section 10(a) process is not workable. Since 1982, only 40 permits have been approved. To make matters worse, once approved, a landowner has no guarantee that the Federal Government will not come back and ask for more because another protected species was discovered—"more" being either more land or more money to be contributed to the HCP.

In an attempt to provide certainty to the Section 10(a) process, Fish and Wildlife has adopted the "no surprises" policy. The purpose was for the Federal Government to provide assurances to private landowners who were participating in the HCPs that no additional land restrictions or financial compensation would be required from an HCP permittee if additional species are listed after the permit is issues.

Builders could support this idea in concept. However, the policy has not been in effect long enough to evaluate its practical effect.

tiveness. For the majority of the time that the policy has been in place, there has been a moratorium on ESA listings.

There is a big difference, however, between the Federal Government saying it won't come back for more land or money and the Federal Government being prevented from doing so by statute. For example, the Act makes it unlawful to "take" an endangered species. The Act defines "take" as including "harm," and the Service has defined "harm" to include "habitat modification." There is no flexibility in these definitions. Consequently, a landowner can spend years cooperating with various resource agencies to develop an HCP, only to discover that a new species has been listed, with all of the absolute prohibitions in place again. Even if the government wanted to, given the way the ESA operates with its absolute prohibitions, there is nothing to prevent an outside party from suing the Federal Government or the landowner when a subsequent species is discovered, compelling greater land use restrictions.

You have asked for my opinion on the exemption for threatened species. My answer is similar to that for the no surprises policy. It sounds good in theory, but it has limited practical application. The reason is simple. Of all the species protected under the ESA, most species are listed as endangered. Only one in four is listed as threatened. This exemption only applies to threatened species.

There is no way for the Fish and Wildlife Service to unilaterally make this exemption apply to endangered species. The extreme prohibitions of the ESA prevent the administration or the Fish and Wildlife Service from creating a useful exemption for landowners. For the exemption to be truly useful, the ESA would have to be amended. Until that time, the exemption is little more than window dressing.

Take the Stephens' kangaroo rat, for example. When wildfires were destroying homes in California, residents were told that they were not allowed to build fire breaks to protect their property because it would destroy the kangaroo rat habitat. Those residents who built fire breaks saved their homes and violated the ESA. Many of those who did not had their homes destroyed.

Unfortunately, the five-acre exemption has been held up as the solution to this problem, but in truth, it is not. The Stephens' kangaroo rat is listed as endangered, not threatened, and therefore the exemption would not have applied. The only means to make this exemption a true solution for landowners requires congressional action. It must be codified into law.

It is important to remember, however, that codifying these policies will not solve all the problems for landowners. Although important, they must be accompanied by key ESA reforms, including better science, legal standing for those injured economically under the Act, a less broad definition of harm to a species, much improved public notice requirements, and compensation for lost land value due to actions under the Act.

These are the kinds of reforms encompassed in the Chairman's bill, which NAHB continues to support strongly. It is only with reforms such as these that the Act can truly balance the need for economic growth and the goal for environmental conservation.

To summarize, the "no surprise" policy, however well intended, is just that—policy. It is not codified in the statute or regulations and therefore has no ability to be enforced.

The five-acre exemption has limited application. Both of these revisions highlight the fact that real reform cannot be achieved in the Executive Branch. As much as Fish and Wildlife wants to be more flexible to implement these reforms, the fact remains that the Act needs to be rewritten. Congress should not and cannot abdicate its role to the Executive Branch. Congress needs to act to amend the statute.

Thank you for the opportunity to speak today.

Mr. POMBO. Thank you.

Mr. Kam, in your statement you talked about private property owners and their inclusion in the process. If I'm misquoting you, you can correct me. But you said they were not included in the process of developing that particular HCP.

Mr. KAM. That is correct.

Mr. POMBO. Can you expand upon that?

Mr. KAM. Let me break that down.

There are preserve landowners—that is, landowners that have land within the designated preserve—and then there's the land outside the preserve that is subject to the mitigation fees. There was never a single landowner that was within the preserve on any committee throughout the entire process.

Mr. POMBO. Just so that I understand you, you have land that is outside of the preserve that is eligible for development if a mitigation fee is paid?

Mr. KAM. No.

Mr. POMBO. You have land that was inside the preserve, and what can you do with that property?

Mr. KAM. That's a good question. We're trying to figure that out ourselves.

Mr. POMBO. It's my understanding that the BCCP has been signed and it's an active document that is no longer being negotiated. Were the conditions of what you can do with that property outlined anywhere within that document?

Mr. KAM. No. The only provision made was that—the only thing we were told was that if you wanted to do something, you had to come in and do your own 10(a) permit. However, in the BCCP documents, it clearly states that the number of acres is the absolute minimum, and the preserve is not valid—the plan is not valid with any acreage less than that designated.

So basically you're caught between a rock and a hard place. Yes, you can go submit your land as a 10(a) permit, but Fish and Wildlife can't release it because they've already issued a 10(a) permit with your land as the designated preserve, with a clear statement that that's the minimum amount for the plan.

Mr. POMBO. This concerns me because I've heard this associated with other HCPs, that the people who end up being the habitat, the permanent habitat, are not included in the decisionmaking process. They are the ones who really have the most to gain or lose by going through that process.

Mr. Frampton, would you care to respond to that, to the statements of Mr. Kam?

Mr. FRAMPTON. I would, Mr. Chairman.

The agreement that was signed between the city and Travis County and the Fish and Wildlife Service is not the Federal Government's plan. It's a plan that was originally brought forward years ago by concerned local citizens, including landowners and businessmen and public officials, who wanted to try to figure out an efficient way and a predictable way to accommodate the very strong pressures for growth in the Austin area, with the need to protect habitat and the desire to protect habitat for the golden-cheeked warbler and other listed and sensitive species. So the plan is a plan that originates with the local people.

Now, this has been one of the most visible, controversial issues in this area for seven or eight years, and there have been a lot of fits and starts. It has finally been brought to fruition.

It is true that Travis County had an initiative vote several years ago, three and a half years ago, on a bond issue, that the voters narrowly rejected, to provide bonds for financing of some of the preserve.

But it seems to me that Mr. Kam's complaint here is that those nasty county commissioners of Travis County, and the City of Austin, the Nature Conservancy and the Texas Wildlife Department, the Fish and Wildlife Service, and other public officials, as he said, who have touted this, all got together in a collaborative effort and developed a plan, which obviously has a lot of public support.

The city did vote a \$42 million bond issue, and that has been used in some part to acquire two-thirds of the preserve area, which is about 30,000 acres within the 633,000 acres all together. The remainder is being raised, in part, by cooperation from Travis County.

Now, I don't know which individuals served on which committees over the last eight years, but the idea that landowners or anyone else who wanted to participate in this process has not had an opportunity to do so seems to me to be very misplaced. There is controversy about this plan, but Mr. Kam's problem seems to be, "well, now that the plan has been concluded, it's not going to work because the land is too expensive." I think there's a factual record that disputes that.

Mr. POMBO. Do you feel that all of the property owners should have been included if they were not?

Mr. FRAMPTON. I think there were probably many, many opportunities in the last seven years for property owners in Austin and Travis County to participate in this very public debate, and I'm sure they did.

Mr. POMBO. Regardless of that, do you think they should have been included if they were not included?

Mr. FRAMPTON. I think there should be opportunities for all landowners to participate in the process. But, you know, that's really the responsibility of the people who advance the permit and the plan. That's the City of Austin and the County of Travis. So the responsibility for inclusion here rests primarily—and Mr. Kam's complaint, if he has a complaint about process, is not with the Federal Government but it's with the city and county officials.

Mr. POMBO. Was the Federal Government involved with the planning process of this particular HCP?

Mr. FRAMPTON. The Federal Government has been very involved in discussions over a number of years with the plan, but the plan itself and the process are developed by local people. So if Mr. Kam has a problem with that process, his problem is with the county and the city and the businessmen and landowners in Travis County and Austin who designed the planning process, not with the Federal Government, which did not design the State and local planning process.

Mr. POMBO. Did Fish and Wildlife or the Department of Interior provide the maps of where suitable habitat was, or where critical habitat was? Were they involved to the degree where they were drawing out on the map what areas should be included and what areas shouldn't be included?

Mr. FRAMPTON. My understanding is that scientists and managers from the city, the county, the State, the Nature Conservancy and the U.S. Fish and Wildlife Service and independent scientists have all been involved in the mapping and habitat identification process.

Mr. POMBO. My time has expired, but I do have a few more questions.

Mr. Metcalf, did you have any questions at this point?

Mr. METCALF. Yes, I do. Thank you, Mr. Chairman.

I understand this hearing is on habitat conservation plans, but my question is a little different. It's one that I've just been waiting to ask on a problem in our area.

It's on the question of delisting species. Could you give me just a really brief idea of what you go through to delist a species when they have recovered?

Mr. FRAMPTON. Well, it's roughly the same process that the law requires for listing a species. A petition can be entertained, or the Service can initiate its own consideration of a delisting. The best scientific information is gathered and there is a proposal that goes out for public review and comment, and then a final decision is made.

Mr. METCALF. So it can be done internally, and I could submit a petition, or somebody could?

Mr. FRAMPTON. That's correct.

Mr. METCALF. Thank you.

The reason I asked that question is because there has been a stunning success of the Endangered Species Act in my area, in the Puget Sound area, and that's with the bald eagles. When we first moved back there in 1974, we would see two or three, maybe, sitting on the sand bar at one time, and we would see one occasionally. Today, we have counted as many as 15 or so sitting on our sand bar, just this one little place. They agree that they have recovered everywhere in the Puget Sound area except on the top of the mountains in the Olympics, where they don't normally go.

You know, this is a chance to declare victory and delist them. But they don't. The reason that they don't—and everybody feels this, and I know it's true—is because, once they delist them, they lose the power over various aspects.

What do we do to get common sense back into this system?

I guess what I'm really asking—and I don't want to take a lot of time today—except to say I would like somebody who is respon-

sible in this area to write me a letter and tell me why, scientifically, they have not delisted the bald eagle.

Mr. FRAMPTON. Well, Mr. Metcalf, we would be happy to respond in writing. But you may or may not be aware that we did initiate and complete the downlisting of the bald eagle in the last year—that got a lot of national publicity—from endangered to threatened, in recognition that around the country, in many places, eagles are coming back. We are clearly, now a year after that, en route to look at delisting all together. So we're moving in that direction.

You're right. This is one of the success stories, which I think demonstrates that we can downlist, and if the evidence supports it on a national basis, in the next couple of years there is a substantial likelihood of a possible delisting.

Mr. METCALF. And they can do that for the Puget Sound area without doing it for the whole Pacific Northwest or whatever?

Mr. FRAMPTON. Well, under the law, you don't simply delist in this county or that State, or that area, in an arbitrary way. I mean, you look at the population as a whole. The same basis on which you list, you delist.

I'm not familiar with the way in which the eagle was listed originally. There are some differences, for example, from Alaska and certain other parts of the country. It is possible that a regional population or subpopulation could be delisted, although that would depend on the science. It's very unlikely that we would, or that the law would permit delisting in one specific location like in Puget Sound and Long Island Sound but not in the rest of the country.

Mr. METCALF. Western Washington even, because it's entirely different than eastern Washington.

I guess I would like to have a letter from somebody telling me what they've done, backing up the reasons why they haven't.

How do I go about submitting a petition? Just write a letter?

Mr. FRAMPTON. Well, you could write a letter to the Director of the Fish and Wildlife Service, Acting Director John Rogers.

Mr. METCALF. OK. Thank you very much.

Mr. FRAMPTON. Or if you write it to me, I'll see that he gets it.

Mr. METCALF. Thank you very much. I will do that.

Mr. KAM. Mr. Chairman, I would just like to point out that in my packet there's the final signed report by the Citizens Committee on the BCCP, which was voted on last spring. You will see two signatures on the first page, which are a city councilman and a county commissioner, and then you'll see seven signatures on the second page, which are lobbyists or environmental groups.

Then attached is a document by the sole landowner on the committee. There was one landowner. One out of ten was a landowner, and he was not even within the preserve. He was the landowner representative and he refused to sign it. There are two pages there on why he refused to sign it.

So to say there's agreement with landowners is just a ludicrous statement. It's totally false and totally misinforming the public on this.

When I did my survey back in the spring of '95, a full third of the people I contacted had no idea what was going on. Nobody had contacted them. Fish and Wildlife, the Parks Department, City of Austin, Travis County, the Federal Government, nobody had con-

tacted them. I was the first contact to them that they were going to be in a preserve. A third of the people!

The landowners in this plan were excluded. And the reasons are obvious. I'm not going to say our Travis County Commissioners or our Austin City Council are real bright people, but they're not stupid. I mean, if the Federal Government comes in with a plan and says, "Hey, guys, we're going to let you get 30,000 acres of parkland at no cost to you through this Federal program," what do you think? I mean, they're not stupid. That's what happened here.

Thank you.

Mr. POMBO. Thank you.

Ms. Walley, you testified about the "no surprises" policy and your concern over that particular policy. I have been told that there are groups that are intent on challenging that, legally challenging that.

Ms. WALLEY. Yes.

Mr. POMBO. On what basis do you intend to legally challenge that policy? I don't expect you to give me a Supreme Court briefing, but just in layman's terms.

Ms. WALLEY. Well, under the Endangered Species Act, essentially the 60-day notice letter that we filed, it was just Endangered Species Act claims that we raised.

It basically is that, in a nutshell, the "no surprises" policy really narrows and almost precludes being able to—the Fish and Wildlife Service, when they enter into these plans, they have a duty to use all their authorities in order to preserve and protect a species, to not jeopardize a species, which is basically ensuring survival and recovery of that species. Basically what we're saying is that this policy does not further that and that the Service is in violation of that duty by enacting this policy.

They are also violating really what the letter and spirit of Section 10 was when Congress enacted it in 1982. When Congress enacted Section 10, they were basically basing it on the San Bruno habitat conservation plan. They were using that as a model. In that plan, there was a section in there where they said essentially 90 percent of the habitat, if further mitigation measures were going to be required, they would then go back and reevaluate the plan and assess further mitigation.

In this instance, under the "no surprises" policy, the Services have essentially narrowed it down to where the mitigation measures are going to be limited to that, to the extent that only the Fish and Wildlife Service or the National Marine Fisheries Service will be able to implement further mitigation.

The landowners aren't going to want to commit further money or land resources. It's now going to be up to the Fish and Wildlife Service to commit further land or resources, and they're going to have to pay for it. You know, I don't see anywhere in their policy where they show how they're planning to pay for this stuff.

Mr. POMBO. The way that you describe this, if someone enters a county or a city, or a major property owner enters into an HCP, to mitigate multi-species in whatever they have listed at the present time in their particular area, and in order to pay for that, they have a mitigation fee—and we've seen a number of figures thrown around, but the one in the testimony here is \$1,500. It would work out to \$1,500 per house of new development.

So they develop this property and new housing goes in, and the people who buy those homes pay their \$1,500 mitigation fee. Ten years down the road, there is another species that's listed. Do you propose that they go back to those home owners to put in more money to mitigate the new species that's being listed?

Ms. WALLEY. You mean if the landowners put in a certain amount of money up front, they're not going to have to pay any more?

Mr. POMBO. Well, the "no surprises" policy would be that this is all you have to pay, this is all the land you have to set aside. If you don't do that, what you're saying then is that we are now going to go back to those home owners who paid for the original HCP and we want them to kick in more money to mitigate against the next species.

How would you propose that we go back to those home owners and have them re-up the money they're putting in?

Mr. WALLEY. If the Fish and Wildlife Service can show that completely unforeseen circumstances have arisen, that they never could have anticipated at the time they entered into the HCP—

Mr. POMBO. I'll grant you that.

Ms. WALLEY. [continuing]—and that they have to go back and renegotiate the mitigation measures in order to prevent the extinction of a species, then they have to go back to the landowners and try to work out a way, to find out how to mitigate. If that requires the additional payment of money, it—

Mr. POMBO. Do you think, if that was the case, that anyone would enter into an HCP, if they knew they would be liable for the future?

Ms. WALLEY. That has been the case. Before 1994, there were HCPs that were entered into and many HCPs that were in progress of being planned before this "no surprises" policy went into effect. It didn't stop those landowners from negotiating with the Fish and Wildlife Service.

The other thing is, what we're trying to say is that, across the board, the "no surprises" policy is a bad idea. There are some circumstances that you could probably provide landowners with greater assurances, but to apply this policy in such a broad way, that is a bad idea. There may be instances where you have a very small project that's going in, and you have done all the scientific research and you know exactly what's going to be happening. You can provide greater assurance.

Mr. POMBO. But you wouldn't know—In your scenario that you drew out, this is for something that's completely unforeseen. I'm sure that when they're doing an HCP they think they've got the best science that they can have at the time and that's what they're basing their decision on. To me, it would not make a lot of sense to enter into an HCP unless you had some certainty that they were not going to come back on you.

You know, I'm not totally opposed to HCPs, but a big part of the problem here is—you know, Mr. Kam talked about what happens to the private property owners in this process. That's one end, on the front end, as to what happens to those property owners who end up being habitat and what happens to their rights. What you're talking about is on the back end, where the people who al-

ready felt like they mitigated their impact would be opened up again to the possibility of paying more into it. Because if you don't want Fish and Wildlife to pay for it, somebody is going to have to. That falls on the backs of the home owners again. This really opens up the door.

Mr. Frampton, if she is successful, or if anyone is successful, in overturning the "no surprises" policy, or if a future administration were to repeal the policy of no surprises, how would that affect the HCPs who went in under the guise of their being a so-called "no surprises" policy?

Mr. FRAMPTON. Well, the "no surprises" policy is just that. It's a policy. It's an announced intention to pursue a certain approach in these individual agreements, issued in 1994.

The organization that Ms. Walley represents has sent us a 60-day notice letter two years later saying they're going to challenge this policy because it wasn't sent out for public comment and it's not within the authority of the Act. We think that's meritless.

When the policy has been used, and it's used differently in each case to adopt a specific agreement, with a landowner or a local or State government, then that agreement, it seems to me, is an agreement that the Federal Government has made with the individuals on the other side of the table and that agreement wouldn't be affected.

Mr. POMBO. So what you're saying is that existing agreements would stand, but future agreements would be the ones that would be in doubt?

Mr. FRAMPTON. Well, if a court were to rule that we did not have the authority to enter into these agreements, obviously, you know, it would put past agreements in some jeopardy.

Mr. POMBO. And what would you do in that case?

Mr. FRAMPTON. Well, we would probably—I think that's a hypothetical, but we would probably try to renegotiate the agreements to provide the same type of security, or they would be adjusted. We have said that we would like to see in reauthorization some provisions that help make it clear exactly what kind of assurances can and cannot be given and have that put into law.

Mr. POMBO. Let me just ask you a final question.

Has the administration put together in bill form, in legislative language, the proposals that you are describing that would codify the "no surprises" policy, changes that would be made to HCPs, ways to tighten up the science? Have you put in legislative language a proposal that would do that?

Mr. FRAMPTON. I have to answer that by describing what we have done.

As you know, two years ago we described the general principles of provisions we would like to see in a reauthorized act, that would help us in the HCP initiative.

In the last six months, I and others working with me have put an enormous amount of time into working, in a very detailed way, with a number of both Republicans and Democrats in the House, and at times five days a week with staff for Senator Kempthorne and Senator Chafee and Senator Baucus, Senator Reid, to try to help them develop bipartisan provisions that the administration could support, based in some part on the Western Governors Asso-

ciation proposals to do this. We have been working very closely for six months. So we have been engaged in incredibly detailed legislative drafting efforts for at least a year, to try to shape what might be in a consensus bill.

Mr. POMBO. Is there a proposal that's been introduced?

Mr. FRAMPTON. But we don't control the legislative agenda.

Mr. Chairman, I saw that you put out a press release for this hearing that tried to blame the administration for the fact that the Endangered Species Act reauthorization hasn't moved forward. I mean, we don't control the Republican leadership. We have worked as hard as we can, for everybody who has asked us, on legislative drafting, to put forward the details of these bills. Ultimately, we can't tell the House of Representatives what to do. We would love to see the Act reauthorized. I think we've worked as hard as we can on the language of specific sections with Members on both sides of the aisle. We're very distressed by the fact that apparently this has all ground to a halt, but it ain't our fault.

Mr. POMBO. Is there a proposal that has been introduced that the administration would support?

Mr. FRAMPTON. I don't know that any of the Members we have been working with have introduced the proposals that we've worked with them on. I think there have been some things introduced that have some of those provisions in them. The Western Governors Association produced a bill on these issues, which we largely supported. But I'm not sure that anything has been introduced in the last six months that reflects the efforts that have been going on by individual Members and Committee staff, to try to do drafting.

Again, we don't control that. We can't—obviously, the administration can't introduce a bill itself.

Mr. POMBO. You do control your own staff. Have you produced any legislative language as a proposal?

Mr. FRAMPTON. The administration has not produced a bill, has not asked somebody to offer an administration bill. We have been trying to work with the majority and minority committee chairs and subcommittee chairs and staff to craft something that the administration could support, and we have spent an enormous amount of time on that in the last year. It's been very frustrating, I have to tell you.

Mr. POMBO. I would like to thank the panel. Again, I apologize for the delays while you were waiting for us, but thank you very much for your testimony.

I would like to also say that there may be additional questions to be submitted to you, and if you could answer those in writing as quickly as possible, we will hold the official record of the hearing open and give you time to do that. I'm sure there will be additional questions that will be presented to you.

Thank you all very much.

I would like to call up the next panel, Mr. Hugh Durham, Mr. Shawn Stevenson, Mr. William Brown, and Mr. William Snape.

Mr. Durham, if you're ready, you can start.

**STATEMENT OF HUGH DURHAM, WILDLIFE BIOLOGIST AND
FORESTER, INTERNATIONAL PAPER COMPANY**

Mr. DURHAM. Thank you.

Good afternoon. My name is Hugh Durham. I'm a wildlife biologist and a forester for International Paper. My primary job responsibility is to manage threatened and endangered species issues for the company. I am here to share ideas about improving the Endangered Species Act, or ESA, from the perspective of private landowners and discuss some of our experiences with habitat conservation plans, or HCPs.

Since 1993, our company has completed two habitat conservation plans. One was for the Red Hills salamander and covered 7,000 acres of our land in south Alabama. The second, currently pending, was for the gopher tortoise. If approved, this will involve 194,000 acres of company timberland in Mississippi and Alabama.

A primary and overarching principle of my testimony today is that the HCP, while it can be a useful tool, is no "silver bullet." HCPs are expensive and not very many private landowners can afford them. Changes are needed in the law to make these plans more feasible for the folks who own most of the habitat in this country—the small, private, nonindustrial landowners.

Our Red Hills salamander HCP requires us to halt timber harvest across 4,500 acres of the plan area. This land becomes a preserve for the salamander in perpetuity, and the company will receive no compensation for providing this public benefit. For the remaining 2,500 acres, we agree to manage timber in a modified way. It cost us \$20,000 to develop the HCP, and we're spending another \$5,000 a year in compliance costs. However, the most significant cost is in foregone revenue, about \$2.5 million of timber that we'll leave standing in the preserve area, and will not harvest and regenerate.

Our gopher tortoise HCP, because of the nature of the species, is less restrictive to our operations, but nonetheless represents a significant cost. Development costs have exceeded \$75,000 and anticipated annual implementation costs will exceed \$7,500. We will allocate 4,500 acres of our land to the management of longleaf pine and gopher tortoises as mitigation. In order to maintain adequate forage on the forest floor for the tortoise, we also propose carrying fewer trees per acre than we would otherwise carry absent the tortoise on that acreage and on acreage with existing tortoise colonies.

Opportunity costs associated with maintaining fewer trees per acre over the life of a stand of trees to benefit the tortoise are significant. These actions will serve as our effort to minimize and mitigate incidental take on other lands we own with isolated tortoises in marginal habitats.

So a point I make to you today is that HCPs can and do further the cause of conservation, but they can take years to develop and incur costs which are high for any landowner. Between the two HCPs we have entered into, we will forego millions of dollars of revenue on thousands of acres of land. Something must change to make the HCP a more viable option for the small landowner. After all, she is the one who owns most of the habitat. However, before I get into my recommendations, let me explain a little bit about who that landowner is.

I am about to share with you portions of a report we are currently developing with the University of Arkansas at Monticello that will be available to you in the early fall. Our report focuses on the forest ownership patterns among the private landowner community across 39 States in the eastern U.S. The information I present here summarizes just one of the regions included in that report and it includes seven States—Alabama, Arkansas, Louisiana, Mississippi, Oklahoma, Tennessee and Texas. There are 99 million acres of total forest area in that seven State region. Two-thirds, 66 million acres, are owned by private, nonindustrial landowners. Public forests make up just 10 million acres, 10 percent of that forested area.

There are over 1.5 million individual landowners in this seven State region alone. Fifty percent own less than 500 acres. Twenty percent own less than 100 acres. In total, 52 million acres of the private forest are in individual ownership in this region.

Twenty-two percent of the landowners are 65 years of age or older. Eighty percent live in the same county their land is in, and most have owned their land for over 20 years.

HCPs and the ESA are not very attainable or attractive among these ownerships. Flexibility is needed to foster innovation, biological and political success, and to begin movement in that direction, here's what we would propose:

Grant immunity from the Act to the private, nonindustrial landowner who voluntarily comes forward to develop and implement management plans for species of concern. This would facilitate early identification of these species and their conservation without excessive administrative cost.

Now, this should be coupled with ongoing HCP initiatives by establishing mitigation banks. This would allow landowners like us the opportunity to generate income through the sale or trade of mitigation credits. Our company has already set aside thousands of acres as habitat through the two HCPs we've completed. There were no land swaps and no compensation from the government.

As is the case within our tortoise HCP, we and other landowners are specially managing for listed species on our land. In return, we obtain permission to incidentally take across other portions of our land. The "other portions" I make reference to could just as easily be someone else's land, where fewer options are available. The ownership pattern in the eastern U.S. lends itself to an arrangement like this. This would allow the small landowner to engage HCPs and incidental take, but without obtaining his own HCP. Instead, he could operate in the Act via the bank's HCP and its incidental take permit. No surprises, safe harbor, mitigation banking, immunity for engaging early; all are good approaches, but none is fully effective unless all are available. None apply everywhere, but all will apply somewhere. When we say flexibility in the Act, this is what we mean.

Skeptics will ask why big timber is an advocate of the little guy. The answer is because he owns the forest. His operating environment, in a sense, is ours. We compete for his fiber. Skeptics will also argue that immunity for the little guy will result in additional loss of habitat. This is invalid as habitat is being lost right now.

Adding the options I have discussed to the Act would establish a means for individual landowners to become participants in early species conservation efforts. Let's get started. Our company is willing to consider and engage the concepts discussed herein if they become part of a reauthorized Act.

That concludes my testimony. Thank you for the opportunity to be here today.

Mr. POMBO. Thank you.

Mr. Stevenson.

**STATEMENT OF SHAWN STEVENSON, PRESIDENT, FRESNO
COUNTY FARM BUREAU**

Mr. STEVENSON. Mr. Chairman, my name is Shawn Stevenson. I am presenting this testimony today on behalf of the American Farm Bureau Federation and the California Farm Bureau Federation. I am a farmer and rancher from the San Joaquin Valley in California. I serve as president of the Fresno County Farm Bureau.

I am here today to testify about three subjects: the habitat conservation plan process under Section 10 of the Endangered Species Act; the proposed five-acre liability exemption; and the so-called "no surprises" policy announced by Secretary of Interior Bruce Babbitt. I will tell you why the HCP process and these two new policies provide no relief to the farmer and rancher.

First, the so-called "no surprises" policy. This simply says that if you enter into an HCP agreement with the Fish and Wildlife Service, the incidental take permit will cover all species expressly provided for under the HCP, whether they are listed at the time the HCP is approved or later. However, the surprise in the "no surprises" policy is this: if the Service decides later that the HCP did not fully provide for an unlisted species, the HCP will have to be changed to add new protections or the permit will not cover that species.

Additionally, there is no offer of take immunity for any species that was simply omitted from the plan because no one knew about it. The "no surprises" policy doesn't provide much security for farmers or other businessmen.

As for the five-acre exemption, although it may help some residential landowners, it does nothing for the problems of the agricultural landowner. In fact, we believe it may unintentionally harm agriculture as well as endangered species by increasing the pressure for subdivision of agricultural lands to qualify for the exemption. As you know, our central valley agricultural lands are being lost at a tremendous rate to urban development right now.

Now to address the habitat conservation plan process. There are basically two HCP processes—the single species, single project HCP, and the regional, multi-species MHCP. The HCP was designed to facilitate large, single landowner projects and urban developments. The regional MHCP was developed primarily for urban development on a broad regional scale. I stress this so that you will understand that both types of HCPs in California are ultimately in urban build-out permits. They do not help agriculture to deal with the ESA and, in fact, they make things worse. And here's why.

Farmers can't afford an HCP. This is a terribly expensive process. Land surveys may take years to be conducted and financed.

Once the potential impacts on species are identified, mitigation must be paid. This mitigation involves either lump sum payments or arbitrary fixed land replacement ratios. Ratios of three to one minimum for conversion of rangelands and one to one for prime agricultural lands are common.

HCPs, and especially the big MHCPs, tend to squeeze agricultural lands out of an area. First, we are displaced. Agriculture cannot relocate when urban sprawl pushes it out because agricultural products simply cannot cover the cost of mitigating the cultivation of new land.

Second, the arbitrary mitigation ratios target ag land for acquisition by developers, since they pay less mitigation for the conversion of cultivated agricultural lands.

Third, agricultural lands are targeted for use as habitat mitigation since zoning makes them the cheapest lands to acquire and enhance for habitat. Agricultural lands, in effect, become the mitigation for habitat conservation plans.

I am not here today to tell you only about the problems with HCPs, but also to offer a potential solution. In California, a number of producer groups have developed and presented to the California Department of Fish and Game and the Fish and Wildlife Service a plan, referred to as HELP—the Habitat Enhancement Landowner Program. It would be a voluntary plan that would protect farmers and ranchers from liability under the Endangered Species Act, and at the same time encourage the protection and enhancement of habitat and endangered species. I will submit a copy of our proposed HELP program with my testimony, and I ask that you give it serious consideration.

I will be happy to answer any questions from the Committee. Thank you.

[Prepared statement of Mr. Shawn Stevenson may be found at the end of hearing.]

Mr. POMBO. Thank you.

Mr. Brown.

**STATEMENT OF WILLIAM R. BROWN, VICE PRESIDENT FOR
RESOURCE MANAGEMENT, PLUM CREEK TIMBER COMPANY,
ACCOMPANIED BY LORIN HICKS, DIRECTOR OF FISH AND
WILDLIFE RESOURCES**

Mr. BROWN. Good afternoon, Mr. Chairman. My name is Bill Brown and I'm vice president with Plum Creek. I am accompanied by Dr. Lorin Hicks, who is our Director of Fish and Wildlife Resources. I appreciate the invitation to discuss our recently completed Cascades Habitat Conservation Plan.

I would like to use my limited time to discuss three aspects of the plan, first, why did we decide to do it; secondly, the costs and benefits of the plan; and lastly, additional actions to address land exchange.

The HCP encompasses about 170,000 acres of our land, the I-90 corridor located in the central Cascades Mountains of Washington. To understand why we did this plan, two business realities must be understood: Plum Creek's landownership pattern and the impact on the company of existing and future regulations under the ESA and in the State of Washington.

This map here to my left is very typical of much of Plum Creek's two million acres in Montana, Idaho and Washington, which is intermingled with Federal land in a checkerboard ownership pattern. If I could just explain this further, this is about an hour east of the Seattle area. To the north is the Alpine Lakes Wilderness Area, the most heavily used recreation spot in Washington State. To the South is Mount Rainier National Park. The middle of that represents the eastern edge of the marbled murrelet territory. It's one of the richest spotted owl habitats in the State, and the northern half of that represents the southern portion of the Cascades grizzly bear recovery area. You can imagine how much fun we're having.

So it was our decision in 1994 to begin negotiation with the Federal agencies on an HCP. Our HCP is significant, in that it not only mitigates for the spotted owl and three other listed species but 281 unlisted species found in the area.

In effect, we have agreed to provide benefits for all the numerous fish and wildlife species in the area, even before they reach the point where they're at risk and need to be listed.

We are motivated to provide this level of benefit for two reasons. The first is due to the commitment made by the government to not impose additional regulations for species covered by our HCP should they ever be listed in the future, the pre-listing agreement. Second was the commitment of the government to not impose additional costs on the company, except in extraordinary circumstances, the "deal is a deal" or "no surprises" policy.

We invested two years and over \$1.3 million in the development of this habitat conservation plan. Although it was strictly a business decision, designed to produce a stable regulatory environment for the company's long-range planning, the public clearly benefits as well. We will exceed virtually every State and Federal standard for environmentally acceptable timber harvest in exchange for stability, to plan harvests, and obtain an acceptable economic return.

The pre-listing agreement and the "no surprises" policy, criticized by some, are the most important elements of our agreement with the Federal Government. Without them, there would be no incentive, commitment or contract. This HCP is the product of two years—actually, many more years than that—of scientific work and unprecedented public input, involving the work of over 20 scientists and technicians, with review and input of over 47 outside peer reviewers. It included over 50 public meetings.

It is important to note that the implementation, research and monitoring costs associated with the HCP are covered by the company. The Federal Government will not be asked to subsidize this plan.

Mr. Chairman, you requested information on set asides and other costs. There are over 30 separate mitigation measures outlined in the plan. A few quick examples of this: we have agreed to defer harvest on 2,600 acres of spotted owl nesting habitat for at least 20 years in order to protect productive owl sites and bridge the gap between short-term habitat loss and long-term recovery of habitat on Federal lands.

We have also agreed to harvest selectively 3,200 acres in order to maintain habitat connectivity between late-successional forests

on Federal land in this complex checkerboard ownership. We will provide 200-foot forested buffers along fish-bearing streams. These buffers benefit a variety of fish as well as wildlife species, and represents millions of dollars of timber at today's values.

My earlier description of the I-90 corridor indicated the difficulties we have with recreation, aesthetics and management efficiency. Clearly, a land exchange would offer an excellent opportunity to address these remaining issues for the company and for the Forest Service.

We have identified about 39,000 acres currently unaccessed by roads, which have been prioritized through discussions with many public groups over the past two years. The Forest Service is in the process of identifying suitable timberlands that could be exchanged to Plum Creek.

This Committee has been a voice for reform in many resource management areas, and I would like to suggest that one of the most positive steps that you could take would be to streamline the land exchange process to accommodate "win win" proposals such as this one. Over the past several months, Plum Creek has worked with Congressman Hansen on H.R. 2466, a bill designed to facilitate the burdensome and time-consuming land exchange process. In addition, we are encouraged that land exchange language has been made part of major ESA bills, including your proposal, co-sponsored by others on this Committee.

Mr. Chairman, this Committee can help public/private resource partnerships in many ways, but two specific suggestions will conclude my remarks today:

Encourage Federal agencies to continue the prelisting and "no surprises" policies and streamline the HCP process to reduce costs and duplicative requirements. The best encouragement would be to provide explicitly for these mechanisms in the ESA.

Secondly, enact H.R. 2466, Mr. Hansen's land exchange bill.

Plum Creek is proud of its HCP, its conservation agreements and land exchanges to protect public resources and promote regulatory predictability. Although these processes are not perfect, as you have heard, they solve problems and deserve a chance to prove their worth. They represent both substantive conservation measures and sound business decisions.

Thank you for your time.

[Prepared statement of Mr. William R. Brown may be found at the end of hearing.]

Mr. POMBO. Thank you.

Mr. Snape.

STATEMENT OF WILLIAM J. SNAPE, III, LEGAL DIRECTOR, DEFENDERS OF WILDLIFE

Mr. SNAPE. Mr. Chairman, thank you for the opportunity to testify before your Committee this afternoon regarding habitat conservation planning and other private land initiatives under the Endangered Species Act. My name is William Snape and I am Legal Director for Defenders of Wildlife.

Conservation of species on private land is, by far, the biggest challenge facing Congress as it seeks to reauthorize the Endangered Species Act. While Defenders is supportive of the concept of

habitat conservation plans to address this challenge and, indeed, has supported some plans in the very recent past, we do possess concerns about the direction these plans now appear to be taking.

Since 1993, the Clinton Administration has approved more HCPs than the Bush and Reagan administrations combined, and has many more in the pipeline. However, linked with this progress are serious conservation risks, probably best exemplified by the so-called "no surprises" policy. This policy, while well intentioned, unjustifiably places the burden of all future and natural events, human and natural, upon the public and wildlife without any meaningful contribution from the private property owner. I believe this dynamic is the result of political pressure by some to remove Federal oversight over all habitat protection.

This is not at all to disparage the notion of regulatory certainty or to downplay its importance. However, if this nation is to keep its commitment—and I quote from the Endangered Species Act—"to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved", then a regulatory certainty must be tempered by honest, scientific assessments of species trends and needs. New information or circumstances can reveal flaws in the noblest conservation objectives, leading to a species decline or even extinction.

Now, I would actually like to discuss the recently approved Plum Creek HCP, which I wholeheartedly admit is a very good start, but that I believe possesses three problems. Those three problems are, one, the temporal scale, two, some continuing scientific questions, and three, the plan's monitoring requirements.

First on the temporal scale. Plum Creek has received a 50-year permit, which makes adaptive management for wildlife almost impossible. For example, we do not believe anyone can predict the breeding and habitat needs for 285 vertebrate species between now and 2046. Could one imagine predicting the present breeding and habitat needs of the northern spotted owl in 1946, the year after World War II ended? I don't think so. For this reason, Defenders of Wildlife strongly believes that permits should be of more limited duration.

Scientific questions. Throughout the plan, terms such as "forest health, watershed health," and "suitable vegetative cover" are used in ways that are either ambiguous or of great contention. There are also a number of highly optimistic assumptions about habitat quality and wildlife populations in the plan which impact the treatment of roadless reserves, wildlife corridors and riparian areas that Mr. Brown just spoke about. Many of the studies supporting these claims have not been peer reviewed, or some were done by Plum Creek itself.

With regard to monitoring, monitoring is absolutely vital to any long-term conservation strategy. Unfortunately, we believe this plan lacks enough concrete and binding steps to monitor compliance. The burden should be on the profiteer, not the public, to demonstrate that a public resource—in this case wildlife—is not being damaged.

Well, what are our solutions? There is no single solution to private land conservation. It is a great challenge. Still, the environmental community and, indeed, some industry representatives,

have begun to articulate three prominent themes that hold the potential answers to our questions. Those three themes are sound science, a secure source of funding, and public involvement.

With regard to sound science, conservation agreements with non-Federal landowners must meet rigorous conservation standards and be based on sound science and recovery goals. Conservation plans that specifically include "no surprises" assurances should include measurable objectives for achieving conservation goals, distinct mechanisms to ensure their monitoring, and plans for adaptive management.

With regard to funding, what in many ways, Mr. Chairman, may be the key issue facing our private land challenge. This Congress will only succeed in updating private land conservation if it directly confronts the long-standing problem of inadequate funding.

We all know that the Act is underfunded. Yet, just this year, for the fiscal year 1997 budget for the Department of Interior's HCP program, the House cut that program by 25 percent. What I think we need is a dedicated funding source for the Endangered Species Act.

Lastly, with regard to public involvement, we agree that everyone should be involved that wants to and need to be with habitat conservation plans. As HCPs become more common, we are hearing more complaints from local citizens about exclusion from some deliberations.

Mr. Chairman, in conclusion, we are absolutely at a historical crossroads with regard to private land conservation. The Clinton Administration, I believe, deserves some credit for attempting to forge new ground. And while Defenders rejects the regulatory approach in some of the reauthorization bills of this Congress, we also like some of the incentive proposals contained in companion bills. We believe those provisions deserve continued attention.

I predict that the 105th Congress will reauthorize the Endangered Species Act with bipartisan support for legislation that squarely addresses this private land challenge. Any legislative solution in the final analysis must be economically credible, but it must also be scientifically supportable and publicly accountable.

Thank you, Mr. Chairman.

[Prepared statement of Mr. William J. Snape, III may be found at the end of hearing.]

Mr. POMBO. Thank you.

Mr. Snape, there were a number of issues that you hit on specifically. One of those is questioning the science that's used in HCPs in general. One of the points you brought out was on peer review and who produced the science and so on.

Is it your opinion that when you are establishing an HCP and developing biological data, that all of that data should be peer reviewed and go through the rigorous scientific process to determine that it's as accurate as possible?

Mr. SNAPE. I don't think that would be very realistic. I certainly understand the fact that on some of the scientific issues that Plum Creek in particular based their conservation plan on, they had to do the best they could. But we did a little study with Defenders' staff on exactly how many of the articles and studies were peer reviewed. It was about 20 percent of all studies cited in the plan

were peer reviewed. If I'm incorrect on that, I would welcome to be corrected. I believe it was around 20 percent.

I just think that number ought to be higher. We ought to be having the soundest science as possible. That's my point. I don't think we're ever going to get to a hundred percent, and I acknowledge that in some instances Plum Creek had no choice but to do their own studies.

Mr. POMBO. But even if they do their own studies, should they not be peer reviewed to determine whether or not they were accurate?

Mr. SNAPE. I think, while we are firm believes in science and implementation of the Endangered Species Act, you could effectively strangle any good-faith attempt at solutions with continued scientific analysis. At some point I acknowledge that you need to move forward.

I think that's why I focus on this 50-year permit. I understand why Plum Creek wants certainty. I have talked with Plum Creek representatives about what they want out of this. I understand that. I just think 50 years is a bit too long. I think as Congress takes a look at the "no surprises" policy, I hope they take a look specifically at that time limit. You know, it's hard to know in 50 years what we're going to need to do. There are many things that are out of our control.

Mr. POMBO. Mr. Stevenson, we heard from two different property owners about the HCP process and what they went through.

In your experience, do you feel that the process that they have described is a usable process for most property owners, particularly the farmers and ranchers like we have in the San Joaquin Valley?

Mr. STEVENSON. Mr. Chairman, in my experience, while the HCPs, in theory, offer some hope and might be workable, I think in reality, especially for agriculture, they have proven to be otherwise.

Again, to go back, cost has a lot to do with that. Also, just land patterns and landownership patterns. As we have seen in our negotiations with the Fish and Wildlife Service, they seem to be too stuck on the handbook right now rather than trying to figure out ways to come up with a plan that will actually work and improve endangered species habitat, and at the same time provide protections for private property owners.

The way I view this process, we need to come up with plans that make both work, where you can accomplish habitat protection and protection for species and protect the interests of property owners at the same time. I think it's possible.

Mr. POMBO. In California, the average farm is somewhere around a couple hundred acres. It's much smaller than that in other States. You heard the process that was described that Plum Creek went through, that International Paper went through.

How would you come to any kind of an agreement similar to what Plum Creek did if you've got 200 acres that you're trying to farm?

Mr. STEVENSON. That's exactly part of the problem. Additionally, what about your neighbors? Let's say that you enter into an agreement with Fish and Wildlife and you encourage endangered species on your property. How does that impact your neighbors when those

species migrate over to their properties? So there are a number of concerns.

Mr. SNAPE. Mr. Chairman, could I just add one thing that's relevant to California?

Mr. POMBO. Sure.

Mr. SNAPE. I actually think HCPs are workable. I have raised a number of criticisms about what I don't like in the Plum Creek HCP, but particularly in California, we would like to work with the California Farm Bureau on the San Joaquin kit fox HCP. In fact, we have called the Farm Bureau a half-dozen times and our phone calls haven't been returned.

We think it is workable, and this is an invitation right now to work with you. I'm not saying it's going to be smooth sailing every step of the way, but I think, if you really put the effort into it, you can do it. I don't think it is unworkable and I think the San Joaquin kit fox is an opportunity to correct that.

Mr. STEVENSON. Mr. Chairman, if I can respond, I brought a picture with me, which I think a picture oftentimes is worth a thousand words.

On my right, your left, is a picture of a canal. It's what we would call "clean farming". Vegetation has been sprayed. Basically there's crop and infrastructure and that's it. There is no habitat in the field margins or anywhere else.

The reason for that, in large part, is because of the disincentives that the Endangered Species Act and the current process holds for farmers and ranchers. Habitat and the presence of an endangered species is now a liability.

I think that if the formula were to be changed to bring along the cooperation of landowners, you could have what you have on the left-hand side, which is a wetlands area which happens to be on my family's ranch, that was built by my grandfather.

Now, I have talked about disincentives. That wetlands right there has actually caused us problems. Because of that, we've had the Army Corps of Engineers and others come in and want to begin to regulate because of that wetland area that we created and enhanced and allowed to exist.

Again, we have got to find a way to remove the disincentives and increase the incentives, and bring along the landowner as a partner in the process.

Mr. POMBO. Mr. Durham, in your statement you talked about the challenges that International Paper had, but you also brought out the land use patterns in the east, particularly in the southeast, and how you felt that there could be a way of bringing in some of the smaller property owners into this process.

Do you think that it's realistic to be able to bring in small property owners with the land use pattern that you have in the south today, that it's realistic to be able to do that?

Mr. DURHAM. Under the Act as it's currently structured now, I do not. The incentives to not lean into the Act if you're a small, private, nonindustrial landowner in the east, are just too great. I just don't think people are going to want to do it.

When you look at the acreage and the numbers of people involved, it's going to take significant change, because you're talking about creating a movement that would really have to be significant

and affect millions of acres. That would be how I would respond. I do not think it's realistic.

Now, if some changes were—

Mr. POMBO. With some of the realistic reforms that have been proposed over the past couple of years—and I know you're familiar with the bill that I introduced—if that were to become law, would it then be possible to bring in some of these small property owners and try to work out some type of a cooperative agreement that would be beneficial to the wildlife in that region?

Mr. DURHAM. I think so. Yes, I think so. It would certainly create opportunities where they don't exist right now for a lot of those landowners, I think.

I guess what I'm suggesting through my testimony here is, while we're at that point, why don't we just go ahead and supercharge it and go right to the heart of some of these things and, while we're hanging here on this opportunity, really try to leverage it. I think if we could do that, through some of the principles that you brought forth in your proposal that you mentioned, we would see greater participation among the small, private, nonindustrial landowners, or at least the opportunity for it would certainly be higher. I would agree with that, yes.

Mr. POMBO. If we did that and increased the number of people that participate in that, the private property rights of those small property owners would be protected in that process, because then it would become a cooperative agreement, a voluntary agreement, to bring them in. Then the disincentive that Mr. Stevenson talks about would no longer be in existence.

You know, I have been down in that part of the country and I have seen some of the same things in your part of the country. It's timberland, and in the San Joaquin Valley it's farmland. But we literally have people managing their properties in a way that is a disadvantage to the wildlife because of that.

Mr. Brown, the process that you went through—and you went through a very extensive, long-term process that involved not only the HCP process but also attempting to do land exchanges in that to make it all work, to make it all fit together. How would small property owners be able to be brought into what you did?

Mr. BROWN. Well, we have involved a handful of small property owners in this area in our work, we provided information to them, sort of a technology transfer if they choose to participate. We certainly haven't diminished their opportunity. We haven't assumed anything for them. So they can pretty much do as they please and are not impacted by our land management strategy.

That said, if they wish to participate, I think the door is probably open for some sort of short form HCP at the office in Olympia, WA, where they don't have to start from scratch and do the research and spend the money we did.

Mr. POMBO. Because that's what you've done, the research and all the—

Mr. BROWN. We've done the work. All the owl work, there's 108 owl circles on our land, and a lot of those owl circles, in fact, are on Federal land, other land. So we did the research over the total half million acre planning area. So they could come into it.

The State of Washington is already in that area. They're doing their own HCP. You heard that. Boise Cascade is doing some sort of landscape plan there. There is only a handful of small private owners. Frankly, their incentive is obviously to harvest their trees and not have spotted owls there, so it may be too late for that kind of protection.

Mr. POMBO. So if you have a couple hundred acres, it would not be very realistic to venture into the kind of program that you guys did?

Mr. BROWN. I think you would think hard and seriously about it.

The other concern, though, for property owners in this area is not just the Federal Government strategy. The State of Washington has its own regulatory design in place. This is a special emphasis area. That's what they call it in the State of Washington. They have their own owl rule for this area. It's the third owl rule in the last five years. So a landowner needs to be concerned about State regulations as well.

The HCP allows you to test out of some State rules, so there is some incentive for landowners to get into an HCP to avoid the State regulatory hammer.

Mr. POMBO. Would the company have entered into this HCP in the event there was not a "no surprises" or "a deal is a deal" policy?

Mr. BROWN. I think it would have been very difficult for us to make that business decision. As you heard earlier, we invested a lot of up-front money. We have made a significant permanent reduction in harvest, tens of millions of dollars.

If we didn't have that kind of assurances, I think we would think seriously about another strategy, which frankly is not particularly in keeping with our environmental principles. It certainly wouldn't be friendly to the biology of the species in the area, ones that are unlisted particularly, as well as the spotted owl. The spotted owl circles in that area are moving circles. We would spend a lot of money chasing those owls around, finding out where they are, and we would be behind them harvesting to ensure that they wouldn't do well.

I mean, our incentives would be perverse without the "no surprises" policy.

Mr. POMBO. Go ahead, Dr. Hicks.

Mr. HICKS. Congressman, I just wanted to comment on a few of the statements made here today.

First of all, with regards to the "no surprises" policy, we essentially suspended the "no surprises" policy in some key areas within our HCP, and there is a chapter written in there on the notion of adaptive management. We identified some key leaps of faith in the HCP process, how models work, how riparian protection areas function, and we made those the target of specific research and monitoring activities with regards to targets that we hoped to achieve in the HCP. If we don't achieve those targets in the HCP, then that becomes the topic of conversation and revision in the HCP with the Service as we move forward.

So we attempted to temper the "no surprises" policy with some good opportunities for adaptive management in viewing the HCP

as a management experiment, that we could then learn how to do some of these things.

With regards to adaptive management and the strength of the science, I just wanted to point out the documents. This is the plan. These are the NEPA documents, the final draft environmental impact statement used to support the plan, and here are 13 peer reviewed technical reports that were used to provide the scientific foundation in two volumes. This provided us a lot of information to go on.

But in terms of peer review on that, we did have the benefit of peer review by over 47 outside folks, including State and Federal biologists involved in the development of the President's forest plan. All reports were sent out for peer review, and folks that had either contributed information or had expertise were given the opportunity to comment.

So I feel we have made the best effort possible to obtain outside review and incorporate those comments in the final papers. We are now submitting those papers for professional publication in a number of journals because they provide very good "stand alone" opportunities to evaluate resource conflicts in forested environments.

As an example of adaptive management in our process, watershed analysis has been talked about here a little bit and I just wanted to say the watershed analysis process we are doing now is very collaborative, involving tribal, local landowners and agencies, and every five years the remedial prescriptions developed in the watershed analysis are sent up for review based on monitoring data acquired by us, the tribes, and other interested parties. So basically, that hasn't changed in terms of the HCP. Every five years we'll be looking at watershed analysis, does it work in these basins, and we'll be doing watershed analysis in 20 basins in the HCP area and getting those all done within five years, and then evaluating them every five years after. So there's a considerable amount of review and revision of information as we acquire it.

Nobody else would be acquiring this information if it wasn't for our HCP. We're providing all of the funding for that. The information we're gathering we're sharing not only with small landowners, to address your concern, but also with the State and Federal agencies.

Mr. POMBO. Thank you.

One final question that I wanted to ask Mr. Snape. I take it that you heard the testimony previously on the Balcones HCP, and there's been talk about the Riverside HCP, the Orange County HCP.

If you set up an HCP like that—and this is something that's different than what Plum Creek did—if you set up an HCP like that and you have people that are inside and outside, and those that are outside can mitigate and pay into a fund somewhere, and those that are inside the habitat basically are restricted as to what they can do with that particular property, what do you foresee happening with the property that is inside the HCP that becomes habitat or preserve land?

Mr. SNAPE. Well, I'm not convinced that the habitat value is going to decline to the extent certainly that was testified to. I am

not at all sure that some of the numbers thrown out had entirely to do with the Endangered Species Act.

You know, on the mitigation costs being sort of labeled as "ransom", my view of how it is you put one of these plans together—and the Balcones is a good example of that—is that you're talking about an infrastructure cost. You're talking about it as you would highways, as you would water systems. You're talking about the public coming up with a structure to deal with the costs of protecting wildlife.

I'm not going to sit here and tell you that protecting wildlife is a free lunch. It's not. I think that's why we all need to talk about how we share that cost in a fair manner.

Mr. POMBO. And for the people that are in the mitigation area, that are outside of the preserve, they are making a conscious decision. When they purchase a house, they know that they are purchasing that house—or at least in California they would have to know—that they're paying "x" number of dollars into a mitigation fund. They would have to know that and they would be making that decision, full disclosure.

The people who are inside the preserve, though, are in a little bit different situation. What happens to them? Do they forever remain—in this instance we're talking about agricultural land—would it forever remain agricultural land?

Mr. SNAPE. Well, the deal with the Balcones situation is that Assistant Secretary Frampton was right. The details of that were fleshed out at the local level. That model has not been mimicked, as far as I can tell, elsewhere around the country. That is not the plan that the Secretary of Interior, as I understand it, has for all other HCPs.

Although I would be happy to research it and get back to you with my opinion, I am not ready to tell you right now exactly what I think happened to the people within that preserve. But that is not the common practice throughout all other HCPs. That is unique to that particular planning process.

Mr. POMBO. What is unique about it?

Mr. SNAPE. The fact that they have set up a preserve inside—at least as you describe it, and again, I don't know the details of it. But if, indeed, it's being described as preserve that is "hands off", that is radically different in every other HCP that I have looked at.

I have looked at almost every other HCP in California. Heck, I've looked at these documents as a lawyer and it gave me a headache. I have looked at a lot of these HCPs and none of them have that type of preserve "hands off" that has been described here today. I'm not sure whether that is a true characterization of that plan or not, but if it is a true characterization, it does not carry that that's the case with other HCPs. I know that for a fact.

Mr. POMBO. I still want to go back to you, so don't push your microphone away.

At International Paper, you have a preserve on your HCP?

Mr. DURHAM. On the Red Hills salamander HCP, there's 4,500 acres that is "hands off". It has \$2.5 million worth of timber on it. We don't cut trees there.

Mr. POMBO. And did you—

Mr. SNAPE. That's a part of a single ownership, though.

Mr. POMBO. You didn't receive any compensation on that property that you set aside?

Mr. DURHAM. No, sir.

Mr. POMBO. So the Riverside example, the Riverside/San Bernardino HCP, they have land that is set aside as part of the HCP. The Orange County HCP has land that is set aside as part of the HCP. The South Coast HCP has land that is set aside as part of the HCP.

I'm not exactly following—

Mr. SNAPE. The difference is, as it has been described in Balcones—and again, Balcones is one of the HCPs that I'm the least familiar with. But with regard to International Paper's HCP, with regard to Plum Creek's HCP, with regard to the Orange County HCP, you don't have a situation where the preserve is affecting multiple residential or commercial landowners. It is a part of a larger plan. Whereas part and parcel of allowing development in other areas in the planning area, where you're allowing incidental take of listed species, you're creating these preserves.

That's what Congress intended in 1982. That is different than at least how it has been described to me in Balcones, where there are different individual landowners who have been somehow saddled and stuck with a preserve—at least that's how it was presented today by at least one landowner. What I'm saying is, that characterization is different than all other HCPs I have—

Mr. POMBO. Are you saying that in the Riverside HCP the land that was set aside was all owned by one person and that that was—

Mr. SNAPE. No, but that was a part of the original plan. Those landowners all—that was a part of the deal.

I think in Riverside, I think that was an equitable result.

Mr. POMBO. A deal with who? Between the people who wanted to develop and the Federal Government?

Mr. SNAPE. Yes, and the local governments, yes.

Mr. POMBO. What about the people who owned land within the preserve, or within the land that was set aside? Because I've heard from Riverside and the South Coast and Orange County, and the different HCPs that have been set up, that the people—and this is very similar to what you heard earlier in terms of what the gentleman was talking about with the Balcones—that the people who were in the preserve were not part of the agreement. They became part of the agreement when it was signed, but as it was being developed, they were not part of it. They become the habitat that allowed someone else to develop.

Mr. SNAPE. In Orange County the situation was that they actually purchased that preserve. The whole HCP was premised upon that acquisition.

In Plum Creek, you did have single ownership, and in the International Paper situation you did have single ownership. That's how those HCPs were framed.

Mr. POMBO. One of my great concerns with this whole HCP process—and it's one of the things we tried to address in the bill that I introduced—is how you treat the individual property owners who end up being someone else's habitat. I know that's not exactly accu-

rate because, you know, you can claim it's all habitat now. But they end up being, because of a land use decision, that is a Federal land use decision, they end up being put in a position of permanent habitat.

This one example I have in front of me that deals with Orange County, it's a 75-year agreement, that that property is going to end up being set aside for 75 years. If I happen to be the person who owns that property, and I wake up one morning and find out that I'm habitat for the next 75 years, not only am I concerned short-term but long-term I'm concerned about my ability to continue to farm that.

Mr. SNAPE. I think the answer in those situations is the "safe harbor" policy, which again I have some concerns about the details of how it's implemented. I think the whole notion with the "safe harbor" policy—and it's true with the example we see with created wetlands here—is that the Fish and Wildlife Service is attempting to go out and say that if landowners do manage their land at a certain baseline level, that they're going to get a degree of regulatory certainty. Again, that basic play, that basic approach, I don't have a problem with. I do have a problem sometimes with how it is actually implemented with details.

The other thing I would point out, too, about agricultural land in California, as you probably know better than I do, the biggest threat to agricultural land in California, particularly in northern California, is urban development, is developers. They want to put in condos, they want to put in strip malls. That's the number one threat to farmers, in my opinion, in northern California.

I think that's when—you know, sometimes you ask the wrong questions. I think the right question would lead you to perhaps looking at estate tax relief for some of those agricultural owners in northern California. I don't think it's always the Federal Government and the Endangered Species Act that is singlehandedly creating some of these economic problems.

Mr. POMBO. I would like Mr. Stevenson to respond to that part, in terms of safe harbor. Go ahead and respond to that first.

Mr. STEVENSON. First of all, we will welcome any estate tax relief we can get. I would be happy to testify about that as well.

Mr. POMBO. That was in my bill, too. Go ahead.

Mr. STEVENSON. Specifically about safe harbor, the problems that we have seen in negotiating with the Fish and Wildlife Service are their ideas about establishing baselines and then the monitoring process.

Right now, out there in the real world, there is tremendous distrust and animosity between landowners and the wildlife agencies, to the point that you will not get these kinds of HCPs or any other kind of cooperative programs through unless that level of distrust is dialed down, on both sides.

The way I do that is addressed through the Habitat Enhancement Landowner Program, which would be an HCP safe harbor program that would be voluntary. It would come up with new ways to address the baseline problem and the monitoring problem, so that landowners could have a level of comfort, where, number one, they are being protected from the liability incurred because of habitat or the presence of endangered species, but at the same time

those landowners would agree to certain management practices, voluntary management practices, to enhance habitat. That's what I view as a "win win" situation.

Mr. POMBO. We're going to wrap this up.

Mr. Snape, I'm getting back to something I asked you before, but it kind of bothers me a little bit. Earlier in the week I had the opportunity to meet with a number of scientists who work for the Federal Government. There was probably close to two dozen of them that I talked to, over a period of a day or so.

I asked them the question about peer review. They all responded the same way, that their agency would never consider releasing any kind of scientific information that had not been peer reviewed. And yet, when we talk about wildlife, when we talk about doing some of these things, everybody says we can't expect to have it all be peer reviewed, as if in this one particular scientific arena peer review is optional.

Mr. SNAPE. I think the confusion is over the definition of peer review. I mean, when Dr. Hicks talked about peer review of their plan, I have no doubt that it was peer reviewed by the very folks within the Federal and State government that he said peer reviewed it. But that is different than independent peer review.

This is the same debate that you've had with others on the listing process, and for the moment we've agreed to disagree. I think we're getting closer. But, you know, the Fish and Wildlife Service already does peer review of listing decisions.

Now, is that peer review independent?

Mr. POMBO. No.

Mr. SNAPE. Probably not. Right. So what we're talking about isn't whether we're going to do peer review or not; we're talking about what type of peer review.

I'll tell you, I would be more than happy to resolve the issue of peer review, because if there's one issue that we all agree on, it is that we should be basing these decisions on the best possible science.

But I will repeat. Sometimes to have the best possible science will just put a stranglehold on any decision. So that is the challenge we have. But if you're asking me to support a proposal for sound science, I would—

Mr. POMBO. That's what made me come back to it. You said that about putting a stranglehold on any decision. That's what made me come back to it. Because these other scientists that are working in environmental areas, but it's a different area than wildlife, they don't understand how any scientist would release information, or any public agency would release any information, without it being peer reviewed.

Mr. SNAPE. Again, what type of peer review? Again, that is the question.

Mr. POMBO. What they're talking about is independent, competitive peer review by experts in the field that do not work for the same agency that's producing the work. They said, you know, that peer review is in the eye of the beholder, which you're well aware of. But they have established a system of outside peer review of all science that they're producing, so that they don't get into some—

You know, today we've heard testimony about supposedly endangered, they claim they were endangered, they claim they were in this area. I mean, you've heard all of these things said. Well, if you were using decent science, the debate would not be as to whether or not it was endangered; the debate would be about how to recover it.

Mr. SNAPE. I think we do use decent science. I actually think that that question—I can give an answer, but I think that question would probably be better answered by Dr. Hicks, in terms of whether he thinks, had his plan been peer reviewed, how far they would have gotten. I don't think very far.

I'm not saying that to disparage the Plum Creek HCP, because again, I have already testified that I think it's a good start. I'm impressed with the effort that they've made. I have problems with it.

But again, listing is a good example. My opinion is, and I know you disagree with it, were we to peer review in the fashion that was contained in your bill, I don't think we would ever have any listings. My opinion is that the effect would be to shut down the listing process. That, to me, is unacceptable.

Conservation biology, of all the sciences, is a relatively new science. It is leaping by bounds daily almost. The very fact that a number of these studies within the Plum Creek HCP are going to appear in journals I think is a testament to that. There's exciting new stuff going on.

I think you can always find a biologist who will tell you—and this happens with the NEPA analyses all the time—you can find any hired biologist, at any time, to tell you whatever it is you want to hear. That's the reality.

Mr. POMBO. That's true in any scientific field. That's why you should do peer review. That's why I think that everything should be peer reviewed.

Did you want to respond to that, Mr. Brown?

Mr. BROWN. Let me just say one quick word about that.

I think peer review sounds exciting, but, of course, the law requires that the Services balance "take" with the mitigation that's practicable. To try to balance economics with science, I'm uncomfortable in allowing the scientific community to opine totally on whether a plan mitigates to the extent practicable and balances the economics.

At the end of the day, this is not purely a biological decision. We're not trying to recover the species on our land. That's not the law. We're trying to mitigate to the extent practicable. It's essentially a good faith judgment decision on whether we use the best science available.

We can certainly in the building blocks do peer review, and I think it was blind peer reviewed by Dr. Hicks' team. I think it was more than just Federal scientists who were involved in the plan. These are outside reviewers, third party, blind peer reviewers who had expertise. So I think it's a little more sound than—

Mr. POMBO. Mr. Brown, I understand that we're talking about apples and oranges when we're talking about the difference between establishing an HCP versus a listing decision or a delisting decision. I understand those are not the same thing.

Mr. HICKS. I just wanted to follow up. Bill made an excellent point about the fact that the process itself is both science driven and driven by the economic realities of what a landowner can afford to do.

In my situation, earlier this morning I made a presentation to the National Academy of Sciences about the work that we did in the HCP. They were very excited about that. When I mentioned the notion of peer review to them, they became very apprehensive. The reason they became apprehensive was because they said if every one of these plans starts tapping every scientist around to peer review it, and you're not doing something like paying them to take their time to look at these things, it will paralyze some of the scientists that are busy trying to do their own work and who would like to help out a fellow scientist.

So the notion of all of these plans tying up many scientists in outside peer review for something like this, as opposed to a very important decision maybe on listing or not listing, could really tie up many members of the scientific community, at a very time when they're all trying to complete some of their very important processes.

I experienced that with this. By asking a scientist with the Forest Service or with the Fish and Wildlife Service or with the State agency to take a look at this paper, I realized that this was taking away from his job. We didn't want to get into the situation where we were paying these guys to do this, because that seemed to be perhaps too mercenary.

Mr. POMBO. Let me ask you a question.

When it comes to wildlife, why is that the case, but when you talk about air quality, water quality, safe drinking water, the Federal agencies that handle those issues require that it be peer reviewed? Why are their scientists not too busy, and why are their scientists able to do it, but when we talk about wildlife biologists, conservation biologists, they're too busy, it would slow down the system too much, you know, we might have to pay them, why does all that come in? Is that just because we don't do it now so we're afraid to require it?

Mr. HICKS. That's a very good question. I think part of the answer on that is that much of the wildlife science is currently developing, and much of it is still opinion oriented. With some of these papers and some of these proposals, there is not as much tabular data and hard concrete facts and figures and readings from scientific instruments that are being asked to be reviewed, and statistical analyses, as much as inferences and information. There is still very much some opinion involved coming on the wildlife side.

And when you look at the multiple species kinds of things, and how many different kinds of—wildlife biologists are seldom experts on all species. There are some that know some particular groups, and others that know other groups. They all need to be somewhat wrapped into these kinds of plans.

I know in my own situation, if I was to take one of these papers and send it through formal peer review for publication in the Journal of Wildlife Management, for instance, which is the major publication in my profession, that takes three years, because of referees and the time it takes for the editors to get information back from

referees and comments, and the time the authors have to respond to those comments. So it's a minimum of three years from submitting a manuscript to when it gets published.

Now, that doesn't mean that a peer review would—it might not take as long. But you get some sense for the kind of timeframe you're dealing with, just to have five outside people take a look at an article for publication.

Mr. SNAPE. There's another difference, Mr. Chairman, which is that when you look at wildlife biology, you're talking about relatively long-term evolutionary trends. When you're talking about air quality, for instance, you're talking about basically technologically-based tests that can be done right there and then. Again, I think you're talking apples and oranges, but with different types of sciences.

Mr. POMBO. The scientists that I talked to earlier in the week I think would give you one heck of an argument as to whether or not what they're doing is evolutionary, whether or not what they're doing is changing by natural conditions or by man-made conditions, whether or not what they are doing is absolutely right, or if a lot of it is based on opinion. There's no difference. It's all full of opinion and you just do the best you can.

But when you talk about wildlife—and no offense to the scientists—but when you talk about wildlife, they're just terrified that you're actually going to make them have all their work peer reviewed.

Mr. SNAPE. Again, I do think that we're talking about the issue of technological fixes. As it relates to species extinction, I have always claimed that I have taken the more conservative view, which is I would rather make sure that we don't lose a key ecological cog. It's very hard within a one or two or three year period to make a determination about a trend of a species surviving or not surviving.

That's what we're talking about. That is precisely why you have wildlife biologists who are extremely nervous to be definitive about whether a species is going to make it or not, because if you're wrong, the consequences are relatively severe.

With air quality, they are severe. There are certainly public health issues with air, no doubt about it. But the technological ability to deal with clean air problems I think is much higher than it is to deal with a species that is irreversibly declining.

I think that is a scientific fact. That is my opinion, and you may take issue with it. But I think there is a different situation between those two examples.

Mr. POMBO. I think we're going to disagree on that. I think a lot of scientists would disagree with you on that. I mean—

Mr. SNAPE. I'm not sure about that.

Mr. POMBO. That's your opinion, and I have mine. But I'm sure there would be broad disagreement in the scientific community with both of us.

I want to thank you for your testimony. Again, I'm sure there will be further questions that people will have, and we will submit those to you in a timely fashion. If there are further questions that are submitted to you, I would request that you answer them as quickly as you can. The official record of the hearing will be held

open to give you an opportunity to do that. I would ask that you answer those as quickly as you possibly can.

Thank you very much for your testimony. I apologize that we had to take a break in the middle of it all. Thank you.

[Whereupon, at 5:25 p.m., the Committee adjourned; and the following was submitted for the record:]

STATEMENT OF GEORGE T. FRAMPTON

Thank you, Mr. Chairman for the opportunity to discuss the policies this Administration pioneered to improve the implementation of the Endangered Species Act (ESA), ease the regulatory burden on private landowners and enhance the conservation of species. My testimony will focus on this Department's efforts, over the last three years, to improve species conservation efforts on private lands, and especially our efforts to improve the Habitat Conservation Planning process. While we still have a great deal to do, our experience over the last three years demonstrates that the ESA can and does work.

From the beginning, this Administration recognized the concerns that American's private landowners have with the implementation of the Act, and over the last three years the Department of the Interior has worked diligently to address these concerns. We believe that successful species conservation must be mindful and responsive to the needs of the landowners of this country, both big and small. Drawing upon the 20 years of experience in implementation the Act, we saw that there were opportunities to improve its implementation; to sharpen the scientific standards that are the foundation of decision-making under the Act; and to develop innovative and flexible new approaches to conservation.

With that in mind, Secretary Babbitt and Commerce Undersecretary Baker announced a series of ambitious administrative changes on June 14, 1994, as well as a 10-point ESA reform plan in March 1995, to accomplish these goals. In summary, these policies: minimize the social and economic impact of recovery planning under the Act; provide independent scientific peer review of listing and recovery decisions; require listing agencies implementing the Act to identify quickly and clearly activities on private lands that may be affected by a listing decision; create cooperative, ecosystem-based approaches to conserve listed and candidate species before crises arise; establish guidelines to ensure decisions made under the Act represent the best available scientific information; and provide a greater role for state and tribal agencies.

Over the last three years, one very important instrument for species conservation that has emerged from relative obscurity to become a major tool for providing flexibility and certainty to landowners is the Habitat Conservation Planning process. The Department has taken a process which was once rarely used and turned it into one the most successful means by which we provide private landowners with creative flexibility as a tool and certainty as a result.

HCPs allow private landowners, after receiving approval of a plan and a permit, to proceed with development projects on their lands that will result in the incidental take of listed species. They provide a mechanism under the ESA to resolve conflicts between species protection and economic activities, and the Service has used them to develop "creative partnerships" between the public and private sector to further species conservation. The HCP process encourages the permit holder to undertake mitigation or conservation measures for listed species in exchange for relief from the incidental taking provisions of the Act. For large-scale HCPs, it is a collaborative process and involves not only the permit applicant and the FWS, but respective states, local governments and other affected parties, as well. For example, in the Pacific Northwest, staff from both the National Marine Fisheries Service (NMFS) and FWS are located in the same building to coordinate development of HCPs. By including numerous stakeholders, the conservation of species is furthered, while minimizing the impacts on landowners.

Landowners and developers who participate in HCPs are provided regulatory certainty, on taking not only listed species, but also any proposed and candidate species that have been adequately address in the plan. This benefits the HCP applicant by ensuring the plan will not change over time with subsequent species listings. It can also provide early protection for many unlisted species that are adequately addressed in the plan, serving to prevent subsequent declines that might otherwise result in the need to list the species.

As a result of our efforts to reach out to landowners, streamline the HCP process, provide participants with certainty and improve the process based upon our experiences, we have overseen a tremendously positive response from landowners and a

corresponding increase in the use of HCPs. While only 14 HCP permits were issued between 1982 and 1992, over 163 permits have been issued since 1993, a 30 fold increase. In 1997, the Service anticipates working on about 300 additional HCP applications, some of which will be done jointly with NMFS.

HCPs offer not only a great deal of flexibility in the types of species covered, but also in the size of the HCP planning area. The diversity and geographical size of HCPs can vary greatly. For example, an incidental take permit was recently issued to Orange County, CA covering 208,000 acres and addressing species including the California gnatcatcher and the Southwestern arroyo toad, as well as numerous candidate species; contrast that to the HCP that was developed and approved for Mr. Richard V. Smith of Travis County, TX for the incidental take of one species, the Golden cheeked warbler, on a ½ acre. Attached to my testimony is a table showing all approved HCPs and those that have been formally submitted as an HCP application, giving the name of the applicant and acreage covered, and I request it be included in the record of this hearing.

Increasingly, HCPs are evolving from a process utilized primarily to address single developments to broad-based, landscape level conservation tools. Examples include those developed pursuant to the State of California's Natural Communities Conservation Planning (NCCP) in Southern California. These large-scale, regional HCPs can significantly reduce the burden of the ESA on small landowners by providing efficient mechanisms for compliance, distributing the economic and logistical impacts of endangered species conservation among the community, and bringing certainty to a broad range of landowner activities.

The Service recognizes that landowners will not always be part of a regional or large-scale HCP, and has recently established a special category for those with relatively minor impacts. Termed "low-effect HCPs," they are defined as those permits that individually or cumulatively have minor or negligible effects on federally listed, proposed, and candidate species and their habitats that are adequately covered in the plan. The purpose of this category is to expedite the processing of these low effect HCP actions. For example, a "template" implementing agreement may be required, and no legal review will be required.

To further improve the HCP process, on September 15, 1994, the Service, in conjunction with NMFS, published a Preliminary Draft Handbook for Habitat Conservation Planning and Incidental Take Permit Processing. After a period of field-testing the draft handbook, the Service is now completing final editing, and we expect it to be printed and distributed by the end of August. The revised handbook will outline streamlining measures and other innovations, including greater flexibility in many procedural decisions and reduction in duplication of requirements found in section 7 of the Act (Interagency Cooperation) and overlap with the National Environmental Policy Act. Also included are guidelines limiting the length of time for processing completed incidental take permit applications once submitted for public comment and final approval (less than 3 months for low-effect HCPs, 3-5 months for HCPs with an Environmental Assessment, and less than 10 months for those requiring an Environmental Impact Statement).

The HCP program has been able to bring together Federal, State, and local government agencies and private interests to address and resolve many endangered species' conflicts. State and local governments and private developers increasingly find that they can safely proceed with their planned activities and meet their obligations under the ESA by using this planning tool.

The remainder of my remarks will focus on several other initiatives also being undertaken to increase the certainty provided to landowners and encourage conservation benefits to species. The first I would like to highlight is the "No Surprises" Policy. In 1982, the 97th Congress recognized that the long-term commitments made by both the Federal government and the private HCP permit holder must be binding to encourage mutual trust; it is a key to the success of the HCP process. That Congress stated that it was its intent that the Secretary may utilize the section 10 process:

"* * *to approve conservation plans which provide long-term commitments regarding the conservation of listed as well as unlisted species and long-term assurances to the proponent of the conservation plan that the terms of the plan will be adhered to and that further mitigation requirements will only be imposed in accordance with the terms of the plan. In the event that an unlisted species addressed in an approved conservation plan is subsequently listed pursuant to the Act, no further mitigation requirements should be imposed if the conservation plan addressed the conservation of these species and its habitat as if the species were listed pursuant to the Act."

(H. Rep. No. 835, 97th Cong., 2d Sess. 30-31 (1982))

On August 11, 1994, The Departments of the Interior and Commerce announced the "No Surprises" policy to implement this intent. Also sometimes called "a deal is a deal," the purpose of the policy is to provide assurance to non-federal landowners participating in HCPs that no additional land restrictions or financial compensation will be required for species adequately covered by a properly functioning HCP. Such certainty is essential for private planning, investment, and overall successful economic development. Significant development projects may take years to complete, and adequate assurances must be made to the development communities that the mitigation measures under an HCP permit will remain defined and predictable for the life of the project. The "No Surprises" policy provides those assurances.

The policy provides that in negotiating "unforeseen circumstances" provisions for HCPs, the Service can not require the commitment of additional land or financial compensation beyond the level of mitigation which was provided for a species under the terms of the HCP. I would like to request that a copy of the August 11, 1994, announcement of the "No Surprises" policy, which provides greater detail, be provided for the record.

Mr. Chairman, your letter of invitation also requested that my statement address any notices of intent to sue which we may have received regarding this policy. Your question is timely. On June 13th of this year, we were served with such a 60-day notice of intent to sue on the "No Surprises" policy. (A copy of that notice is provided for the record.) Our Solicitors are currently reviewing this notice.

Another policy currently being used to encourage conservation efforts by private landowners is the "Safe Harbor" initiative. We are very aware that some landowners fear actions taken by them to successfully maintain or enhance habitat on their properties for species, may result in subsequent activities being restricted because of ESA provisions. This perception has in some instances created a disincentive for landowners to manage their lands for the benefit of listed, proposed, or candidate species and some may even manage habitat in a way to prevent occupation by listed species. To address this issue, the Service is seeking ways to encourage landowners to conserve our Nation's heritage by creating incentives.

The "Safe Harbor" concept is such a program. It protects landowners from ESA restrictions when they voluntarily undertake land management actions to benefit listed species. In return, the Service provides assurances to the landowner that future activities would *not* be subject to ESA restrictions above those restrictions applicable to the property at the time of enrollment into the program. "Safe Harbor" assurances are formalized through a permit and an agreement between the landowner and the Service. The Service is preparing a national policy for the efficient, effective, and consistent implementation of this concept.

The first "Safe Harbor" agreement was the Sandhills Safe Harbor in North Carolina. The red-cockaded woodpecker is the target species of this particular program. At least 3 other agreements have been finalized that include approximately 5,200 acres of private lands. Furthermore, there are at least 17 other agreements in various stages of development. A table showing the location, acreage, and land use of these agreements is attached to my testimony. Considering that over 700 listed species are known to occur on private or non-Federal lands, this policy has great potential to enhance our ability to enhance the status of listed species.

Another recent tool that we are providing to landowners is the so-called "No Take" Memorandum of Understanding. These MOUs are designed to confirm for landowners that the actions specified under an agreement that will not result in the incidental take of species will not be hindered. It assists landowners by relieving them of the possible need to apply for an incidental take permit through the Habitat Conservation Planning process. The MOUs describe how the landowner can assist in the conservation of a listed species, and provide assurances that the defined activities the landowner wants to undertake on his or her property will not be curtailed. Again, we are providing certainty for landowners working to conserve species.

Similar to the "No Take" option, the Administration is also encouraging private landowners to help conserve candidate species on their lands by entering into conservation agreements with the Service. A conservation agreement is a voluntary, formal written document signed by both the landowner, and ideally the affected State fish and wildlife agency, and the Service. It specifies the actions and responsibilities of each party to decrease threats to candidate species. Proactive in nature, successful conservation agreements have the potential to lower a species' priority for listing or even eliminate the need for listing. Examples of actions landowners can take include: habitat protection; management or restoration actions, such as fencing, control of public access, stream rehabilitation, controlled burns; or even reintroduction of species to suitable habitat. Landowners benefit by knowing specifically what actions they can take to protect the species and what actions can be done on the property that will have no, or only minimal adverse impact on the animal or plant.

The process provides certainty to the landowner and aids in the conservation of species.

Another area where flexibility had been under-utilized was under section 4(d) of the Act. Under this section, the Secretary can, for species listed as threatened, issue regulations necessary for the conservation of the species. The Fish and Wildlife Service has used this authority in the past to develop tailored regulations for species such as the Louisiana black bear and the California gnatcatcher and has proposed a special rule for the Northern spotted owl in Washington and California. These rules can significantly ease the burden of the ESA on private landowners.

Last year, under the provisions found in section 4(d), the Secretary proposed a Small Landowner Exemption (5-Acre Exemption). On July 20, 1995, the Service published a proposed rule which would create a regulatory presumption exempting certain landowners and low-impact activities from the Act's requirements for threatened species. The proposal applies to species listed as "threatened" under the law, and would cover most current landowners who use their property as a residence, want to disturb 5 acres of habitat or less, or who undertake activities that have a negligible impact on the species overall. The Service would ultimately assess the applicability of this regulatory presumption on a species by species basis, applying it to future listing of threatened species where the applicant was deemed consistent with the conservation needs of a given species. It would also establish a general exemption for activities conducted in accordance with a State-authorized or developed habitat conservation plan for a threatened species.

The public comment period on the proposal closed on September 18, 1995. The Service received 63 comments on the proposed rule, expressing a wide variety of reactions. Many objected to the exemptions, believing they would lead to habitat fragmentation, significant cumulative impacts on species and enforcement problems. In contracts, others felt the exemptions would not provide sufficient relief to landowners. State and local government agencies largely supported the proposed rule.

In closing, I must point out that our efforts to increase our work with private landowners have been hampered by the severe budget cuts and fiscal uncertainties in 1995 and 1996. We have worked hard to continue providing landowner assistance through the HCP and Safe Harbor processes, but the cuts in the endangered species program have taken a toll on our ability to proceed with many of our efforts, including the completion of the Small Landowner Exemption. I urge Congress to fund the endangered species program, in the fiscal 1997, as requested by the President. Adequate funding is essential if we are to be able to fully implement the ESA reforms we have already developed and continue to develop innovative methods for ensuring that our endangered and threatened species are protected and recovered while minimizing adverse impact to private landowners.

Thank you again for the opportunity to testify on the Department's highly successful efforts to improve implementation of the Act. I'd be happy to answer any questions the Members of the Committee may have.

STATUS OF
HABITAT CONSERVATION PLANS
Fish and Wildlife Service
Region 1

As of May 21, 1996
Total Permits Issued: 163
Total Amendments Issued: 15
Total Applications Submitted: 30
Total Applications Pending or Underdevelopment: 142
(Pending plans are not identified in this table)

PLAN TITLE	LOCATION	STATUS*	COMPLEXITY**	PRIMARY LISTED SPECIES***	PRIMARY CANDIDATES	DATE ASSISTANCE INITIATED	SIZE ACRES
San Bruno Mountain (PRT 2-9818)	San Mateo Co., CA	I (3/83)	H	MBB, SBE, SFGS	CSB	1982	2,750
San Bruno Mountain Amdt. #1 (South Slope)	San Mateo Co., CA	I (8/85)	L	MBB, SBE, SFGS	CSB	1984	35
San Bruno Mountain Amdt. #2 (County Park)	San Mateo Co., CA	I (6/86)	L	MBB, SBE, SFGS	CSB	1986	19
San Bruno Mountain Amdt. #3 (Rio Verde)	San Mateo Co., CA	I (12/85)	L	MBB, SBE, SFGS	CSB	1985	40
San Bruno Mountain Amdt. #4 (NE Ridge) (PRT 2-9818/746660)	San Mateo Co., CA	I (8/90)	L	MBB, SBE, SFGS	CSB	1990	230
Coachella Valley (PRT-698685)	Riverside Co., CA	I (4/86)	M	CVFTL	None	1984	70,000
County of Riverside Short-Term Permit (PRT-739678)	Riverside Co., CA	I (8/90)	H	SKR	None	1988	4,400
County of Riverside Short-Term Permit Amdt. #1 (Tenequia Addition)	Riverside Co., CA	I (1/91)	H	SKR	None	1990	N/A
County of Riverside Short-Term Permit Boundary Amdt. #1	Riverside Co., CA	I (2/92)	L	SKR	None	1991	N/A
County of Riverside Short-Term Permit Boundary Amdt. #2 (22 amendments)	Riverside Co., CA	I (3/15/93)	M	SKR	None	1/92	N/A

PLAN TITLE	LOCATION	STATUS*	COMPLEXITY**	PRIMARY LISTED SPECIES***	PRIMARY CANDIDATES	DATE ASSISTANCE INITIATED	SIZE ACRES
County of Riverside Short-term Permit Boundary Amdt. #1 (Moreno Highlands Addition)	Riverside Co., CA	I (3/25/93)	H	SKR	None	1/92	N/A
County of Riverside Short-term Permit Boundary Amdt. #1 Reconsideration-Orangecrest	Riverside Co., CA	I (2/24/93)	M	SKR	None	6/92	N/A
County of Riverside Short-term Permit Boundary Amdt. #1 Time Ext. w/ Amdts.	Riverside Co., CA	I (4/30/93)	L	SKR	None	10/92	N/A
County of Riverside Short-term Permit Boundary Amdt. #1 Time Ext. w/ Amdts.	Riverside Co., CA	I (12/29/93)	L	SKR	None	8/93	N/A
Cal. Dept. of Corrections Delano Prison (PRT-744982)	Kern Co., CA	I (1/90)	L	SKJF BNLL, TKR	None	1989	635
Lennane Properties (PRT-730836)	Sacramento Co., CA	I (8/90)	L	VELB		1990	48
City of Marysville (PRT-746819)	Yuba Co., CA	I (1/91)	L	VELB	SP	1990	27
Coalings Cogeneration (PRT-754027)	Fresno Co., CA	I (3/91)	L	SKJF, BNLL		1989	6.5
Clark County (Short-term) (PRT-756260)	Clark Co., NV	I (7/24/91)	H	DT		1990	22,352
Clark County (Short-term) Permit Amdt. (Extension) (PRT-756260)	Clark Co., NV	I (7/29/94)	H	DT		1990	30,352
Corona Development Co. (PRT-787639)	Riverside Co., CA	I (12/91)	L	SKR			715
Corona Development Co. Permit Amdt. (Extension) (PRT-787639)	Riverside Co., CA	I (3/3/94)	L	SKR			N/A

PLAN TITLE	LOCATION	STATUS*	COMPLEXITY**	PRIMARY LISTED SPECIES***	PRIMARY CANDIDATES	DATE ASSISTANCE INITIATED	SIZE ACRES
Citation Builders Ridge at Cresta Verde (PRT-760140)	Riverside Co., CA	I (9/28/92)	L	SKR	None		22
Simpson Timber Company (PRT-767798) Forest Plan	Humboldt, Del Norte, Trinity Cos., CA	I (9/92)	M	NSO		1991	380,000
Envirocycle, Inc. (PRT-771172)	Kern Co., CA	I (2/26/93)	M	SJKF, BNLL		1989	20
Yucca Valley Church Sites (PRT-779093)	San Bernardino Co., CA	I (8/26/93)	L	DT		8/92	5
Murray Pacific Corp. (PRT-778268) Forest Plan	Mineral Tree Farm Lewis Co., WA	I (9/24/93)	M	NSO		12/91	55,000
Murray Pacific Corp. Amendment (PRT-778268) Forest Plan	Mineral Tree Farm Lewis Co., WA	I (6/26/95)	M	MM	Multi-species		N/A
Coyote Hills East (Unocal) (PRT-768184)	Orange Co., CA	I (11/93)	M	CG	CM		45
Granite Construction (PRT-778268)	Fresno Co., CA	I (12/29/93)	L	SJKF		1990	54
Valley of Fire State Park (PRT-781039)	Clark Co., NV	I (1/20/94)	L	DT		8/92	20,000
Pacific Gateway Homes	Riverside Co., CA	I (5/27/94)	L	SKR		9/94	27
Sunland Communities Inc. (PRT-757505)	San Bernardino Co., CA	I (6/13/94)	L	DT			160
Chaparral Shores (PRT-763666)	Kern Co., CA	I (6/1/94)	L	TKR	None	1991	82
Metropolitan Bakersfield (PRT-786634)	Kern Co., CA	I (8/24/94)	H	SJKF, BNLL, TKR, BC, SJMT, RMS		1987	262,000
Nye County Landfill (PRT-776604)	Nye Co., NV	I (2/13/95)	L	DT		1990	80
Heverhauser (Willicom Tree Farm) (PRT-796822) Forest Plan	Coos Bay, OR	I (2/14/95)	M	NSO	None	10/93	210,000

PLAN TITLE	LOCATION	STATUS*	COMPLEXITY**	PRIMARY LISTED SPECIES***	PRIMARY CANDIDATES	DATE ASSISTANCE INITIATED	SIZE ACRES
John Laine Homes (PRT-791935)	Corona, CA	I (3/22/95)	L	SKR			30
Coast Range Conifers (PRT-789465) Forest Plan	Yachats, OR	I (3/22/95)	L	NSO, NM	None	1993	100
Fieldstone (PRT-795759)	San Diego Co., CA	I (6/7/95)	H	CG		7/92	1,918
City of Waterford (PRT-801047)	Stanislaus Co., CA	I (6/9/95)	L	VELB			5
Clark County Long-Term Permit (PRT-801045)	Clark Co., CA	I (8/11/95)	H	DT		4/94	525,000
Reg'l Estates (PRT-803749)	Humboldt, CA	I (8/30/95)	L	NSO, NM, PF, BE	Multi-species	1994	500
Spring Mountains (Nevada Dept. of State Parks) (PRT-802140)	Clark Co., NV	I (9/1/95)	L	PP		1994	5
Oregon Dept. of Forestry Forest Plan	Elliott State Forest, OR	I (10/3/95)	M	ABE, NSO, NM	None	3/93	94,000
Colton Transmission Line (PRT-805907)	San Bernardino Co., CA	I (11/29/95)	L	DT		1994	8
Lake Mathews (PRT-805839)	Riverside Co., CA	I (12/5/95)	H	SKR, CG			5,110
San Diego Gas & Electric (PRT-806637)	San Diego Co., CA	I (12/18/95)	M	Multi-species	Multi-species	1993	
Cudahbury Sand & Gravel (PRT-792218)	San Bernardino Co., CA	I (1/02/96)	M	DT			42
Chevron Pipeline (PRT-807634)	Kern Co., CA	I (2/25/96)	L	SIJF, BNLL, TKR, GKR		1994	15.4
ARCO Western Energy	Kern Co., CA	I (3/01/96)	H	SIJF, BNLL, TKR, GKR		1994	31,360
Scofield Corporation Forest Plan (PRT-81110)	Chelan Co., WA	I (4/03/96)	L	NSO			40
D.S.O. Development Co., Sand City	Monterey Co., CA	I (4/25/96)	L	SBB, SG, MSF	BLI, SHM, MC		32.5

PLAN TITLE	LOCATION	STATUS*	COMPLEXITY**	PRIMARY LISTED SPECIES***	PRIMARY CANDIDATES	DATE ASSISTANCE INITIATED	SIZE ACRES
North of Playa Shopping Center	Monterey Co., CA	I (4/25/96)	M	SBB	BLL	1994	33
Riverside County Multi-species (NCCP) Plan	Riverside Co., CA	I (5/3/96)	H	CG	Multi-species	7/91	2,000,000
City of Poway	San Diego Co., CA	A	M	CG, LBN, SWF	Multi-species		25,000
Seascape Uplands	Santa Cruz Co., CA	A	M	SCLTS	None	1990	190
Shell Oil (PRT-784571)	Yorba Linda, Orange Co., CA	A	M	CG	CM	1993	875
Kern County Sanitary Landfill	Kern Co., CA	A	L	SJKF, BNLL		1994	1,500
Ocean Trails	Los Angeles Co., CA	A	M	CG		11/93	261
Port Blakely Tree Farm	Mason Co., WA	A	L	MSD, MM		10/93	21,000
Orange Co. Central Coast Multi-species (NCCP) Plan (Irvine Company)	Orange Co., CA	A	H	CG, SAT, APF	Multi-species	1992	208,000
Robert Eddar Turkey Farm (PRT-751021)	Tulare Co., CA	D (5/15/91)	L	SJKF, BNLL, TKR		1990	210

Region 2

PLAN TITLE	LOCATION	STATUS*	COMPLEXITY**	PRIMARY LISTED SPECIES***	PRIMARY CANDIDATES	DATE ASSISTANCE INITIATED	SIZE ACRES
Lake Line Mall (PRT-762988)	Williamson Co., TX	I (2/13/92)	L	BCH, TGB	None	3/90	116
Canyon Ridge (PRT-777085)	Travis Co., TX	I (8/17/93)	L	GCM	Plant Canyon meadow courage)	9/92	142
Canyon Ridge Amdt. (PRT-777085)	Travis Co., TX	I (2/15/95)	L	GCM	None	9/93	24
Lake Pointe (PRT-782186)	Travis Co., TX	I (2/15/94)	L	GCM	None	5/93	496
Cedar Park Waterline (PRT-788842)	Travis Co., TX	I (9/16/94)	L	GCM		11/93	3.4 miles
Richland Bull Creek Assoc. (Spicewood Parkway) (PRT-783564)	Austin, TX	I (12/16/94)	L	GCM	None	3/93	180
Barton Creek Community (PRT-782835)	Travis Co., TX	I (2/16/95)	M	GCM	BSS	9/93	1,750
Westminster Glen (PRT-793122)	Travis Co., TX	I (2/24/95)	L	GCM	None	9/93	120
Davenport Ranch (PRT-782829)	Travis Co., TX	I (3/7/95)	L	GCM		4/93	70
Richard J. Smith (Lot owner) (PRT-787880)	Travis Co., TX	I (4/4/95)	L	GCM	None	1/94	0.5
Howard L. Burris, Jr. (16 Applications: PRT-798294, 798300, 798291, 798296, 798290, 798286, 798288, 798297, 798298, 798299, 798293, 798295, 798292, 798301)	Travis Co., TX (Jester-Housing Development; Lots 15, 17-25, 27-28, 33-37)	I (4/12/95) 16 Permits	L	GCM		1/95	16 lots
Charles Dixon (Lot owner) (PRT-798532) (Long Canyon)	Travis Co., TX	I (4/18/95)	L	GCM		1/95	1.5

PLAN TITLE	LOCATION	STATUS*	COMPLEXITY**	PRIMARY LISTED SPECIES***	PRIMARY CANDIDATES	DATE ASSISTANCE INITIATED	SIZE ACRES
Peter Van Cuylenburg (Lot owner) (PRT-798667) (Red Key Creek)	Travis Co., TX	I (4/18/95)	L	GCM		1/95	5.4
Larry H. James (Lot owner) (PRT-798674)	Travis Co., TX	I (4/18/95)	L	GCM		1/95	5.8
Wayne Bell (Lot owner) (PRT-799946)	Travis Co., TX	I (5/1/95)	L	GCM		2/95	4
Rox Rivers (Lot owner) (PRT-799945)	Travis Co., TX	I (5/1/95)	L	GCM		2/95	6.7
Richard Baggett (Lot owner) (PRT-800131) (Long Canyon)	Travis Co., TX	I (5/23/95)	L	GCM		3/95	1.01
Steven Madrene (Lot owner) (PRT-799859)	Travis Co., TX	I (5/23/95)	L	GCM		3/95	
Stephen Adler (Lot owner) (PRT-800130)	Travis Co., TX	I (5/24/95)	L	GCM		3/95	0.73
Larry Beasley (Lot owner) (PRT-800080) (Lake Travis Subdiv.)	Travis Co., TX	I (5/24/95)	L	GCM		3/95	9
Cecil Ethridge (Lot owner) (PRT-799863)	Travis Co., TX	I (5/24/95)	L	GCM		3/95	
JPI Texas Development (PRT-790130)	Travis Co., TX	I (6/12/95)	L	GCM		3/94	66
Bette Pressler (Lot owner) (6 applications: PRT-800438-800443) (West Lake Mills development; Lots 1-6)	Travis Co., TX	I (6/13/95) 6 permits	L	GCM		3/95	14 lots
Carolyn Pratt (Lot owner) (PRT-801373) (Windmill Bluff)	Travis Co., TX	I (7/24/95)	L	GCM		4/95	2.7
Ralph Koster (Lot owner) (PRT-801381) Cardinal Mills Lot 133)	Travis Co., TX	I (7/24/95)	L	GCM		4/95	
Jim Herbert (Lot owner) (PRT-801839)	Travis Co., TX	I (7/24/95)	L	GCM		4/95	0.8

PLAN TITLE	LOCATION	STATUS*	COMPLEXITY**	PRIMARY LISTED SPECIES***	PRIMARY CANDIDATES	DATE ASSISTANCE INITIATED	SIZE ACRES
Bobby Thomas (Lot owner) (PRT-801588) (Georgetown Street)	Travis Co., TX	I (8/28/95)	L	GCW		4/95	
Albert Graci (Lot owner) (3 applications: PRT-801823, 801837, 801836)	Travis Co., TX (620 Oaks, Lots 17-19)	I (8/28/95) 3 permits	L	GCW		4/95	1.3, 1.5, 1.5
Chris Milam (Lot owner) * (4 applications: PRT-803131-803133, 801135)	Travis Co., TX (River Hills, Lots 1-4)	I (8/28/95) 4 permits	L	GCW		5/95	
Joseph Will (Lot owner) (PRT-803148) (Lodge Acres)	Travis Co., TX	I (8/28/95)	L	GCW		5/95	5
Overlook at Cat Mountain (PRT-782824)	Travis Co., TX	I (8/31/95)	L	GCW	None	8/93	213
David Dickey (Lot owner) (800 Toy on Lake)	Travis Co., TX	I (10/10/95)	L	GCW		6/95	
Richland SA, Ltd (13 applications) (PRT-804126-804133, PRT-804135-804139)	Travis Co., TX (Canyon Mesa, Lots 1-10, 12-14)	I (10/10/95) 13 permits	L	GCW		6/95	
Gulf Coast Prairies State Harbor	southern TX	I (11/21/95)	M	APC, HT	Multi-species	1/95	100 square miles
Bhupinder Bhasin (formerly K. Townsend) (Lot owner) (PRT-795603)	Williams Co., TX	I (11/21/95)	L	GCW		7/94	1
Wallace Tract (PRT-782971)	Travis Co., TX	I (2/19/96)	L	GCW	BSS	9/93	74
Andrus Subdivision (PRT-804628)	Travis Co., TX	I (2/23/96)	L	GCW		5/95	35
Balcones Canyonlands (PRT-788841)	Travis Co., TX	I (5/2/96)	H	BCV, GCW, 5 Cave Invertebrates	Numerous	8/88	635,000
Paul/Angeta Hursti (Lot owners) (PRT-806824)	Travis Co., TX	I (3/29/96)	L	GCW		9/95	

PLAN TITLE	LOCATION	STATUS*	COMPLEXITY**	PRIMARY LISTED SPECIES***	PRIMARY CANDIDATES	DATE ASSISTANCE INITIATED	SIZE ACRES
Janis Goynes (Lot owner) (PR-806825) (Cardinal Hills Lot 8)	Travis Co., TX	I (3/29/96)	L	GCW		9/95	
Louise Hausman (Lot owner) (PRT-804829) (Cardinal Hills Lot 13)	Travis Co., TX	I (3/29/96)	L	GCW		9/95	
Lance Brubaker (Lot owner) (PRT-806827) (Cardinal Hills Lot 56)	Travis Co., TX	I (3/27/96)	L	GCW		9/95	
Douglas Barclay (PRT-806691)	Travis Co., TX	I (2/19/96)	M	GCW		9/95	164
P-48 Joint Venture (PRT-808694)	Travis Co., TX	I (3/12/96)		GCW		4/95	333
Park 22 (PRT-807192)	Travis Co., TX	I (5/16/96)		GCW		9/95	32
Albert Graci (620 Oaks Lot 17) (PRT-801823)	Travis Co., TX	I (8/28/95)	L	GCW		4/95	1.3
Albert Graci (620 Oaks Lot 18) (PRT-801823)	Travis Co., TX	I (8/28/95)	L	GCW		4/95	1.5
Albert Graci (620 Oaks Lot 19) (PRT-801823)	Travis Co., TX	I (8/28/95)	L	GCW		4/95	1.5
Hilltown (PRT-791946)	Travis Co., TX	A	L	GCW		5/94	51
The Volente Group (Housing Development) (PRT-806351)	Travis Co., TX	A	M	GCW		9/95	2,573
Chuck Clinton (Yucca Mtn) (PRT-812703)	Travis Co., TX	A	L	GCW		2/96	lot
Lake Pointe II Andlt. #1 (PRT-782186)	Travis Co., TX	A	L	GCW		3/96	lot
Bee Cave Oaks Dev. Inc. (PRT-812668)	Travis Co., TX	A	L	GCW		2/96	340
Ivaboe, Inc. (PRT-812670)	Travis Co., TX	A	L	GCW		1/96	950

PLAN TITLE	LOCATION	STATUS*	COMPLEXITY**	PRIMARY LISTED SPECIES***	PRIMARY CANDIDATES	DATE ASSISTANCE INITIATED	SIZE ACRES
Robert A. Baker (Rob Roy on Lake) (PRT-809217)	Travis Co., TX	A	L	GCW	None	10/95	Lot 658
Robert C. Paris (Lake George town) (PRT-809218)	Williamson Co., TX	A		GCW		11/95	Lot 9/10
Mt. Larson (summit) (PRT-808719)	Travis Co., TX	A		GCW		5/94	150
Hill town (PRT-791946)	Travis Co., TX	A		GCW		5/94	51
Lakeview Property Co. (PRT-812690) (R. Hol)	Travis Co., TX	A	L	GCW		2/96	304
Lakeview West Investment (PRT-812695) (High)	Travis Co., TX	A	L	GCW		2/96	1,277
Lakeview Land Ltd. (PRT-812695) (Schramm)	Travis Co., TX	A	L	GCW		2/96	498
Davenport Ranch Amdt. #1 (PRT-782829)	Travis Co., TX	A	L	GCW		4/93	200
Paul A. Locus (PRT-808721) (Lane Lot 4)	Travis Co., TX	A	L	GCW		9/95	5
Jalil/Judith Mirzadegan (PRT-809220)	Travis Co., TX	A	L	GCW			14 acres (3 lots)

Region 5

PLAN TITLE	LOCATION	STATUS*	COMPLEXITY**	PRIMARY LISTED SPECIES***	PRIMARY CANDIDATES	DATE ASSISTANCE INITIATED	SIZE ACRES
Piping Plover HCP (State of Massachusetts) (PRT-813653)	Essex, Plymouth, Barnstable, & Bristol Cos., MA	1 (4/12/96)	M	PP		1994	200 coastal miles

Region 4

PLAN TITLE	LOCATION	STATUS*	COMPLEXITY**	PRIMARY LISTED SPECIES***	PRIMARY CANDIDATES	DATE ASSISTANCE INITIATED	SIZE ACRES
Nichols/Hendrix/Post (PRI-601992)	N. Key Largo, FL	I (1986)	L	Key Largo rodents	None		1
Driscoll Properties (PRI-736470)	N. Key Largo, FL	I (1990)	L	Key Largo rodents	None		42
Wal-Mart Corporation (PRI-774703)	Highland Co., FL	I (3/11/93)	L	FSJ, EIS	GF, plants	3/93	28
International Paper (PRI-780314)	Southern AL	I (10/19/93)	H	RHS	None	3/93	30,000
SeaMist, Inc. (PRI-784126)	Baldwin Co., AL	I (12/27/93)	L	ABM	None	9/93	46
D&E Investments, Ltd. (PRI-787172)	Baldwin Co., AL	I (5/3/94)	L	ABM			252
Fel-Kron Plumbing (PRI-787698)	Baldwin Co., AL	I (5/9/94)	L	PERM			46
Ocean Ridge, Limited (PRI-787965)	Brevard Co., FL	I (6/1/94)	L	FSJ			9
H. Presley (Lot owner) (PRI-789188)	Brevard Co., FL	I (6/10/94)	L	FSJ			0.5
W. Tapper (Lot owner) (PRI-790906)	Brevard Co., FL	I (7/19/94)	L	FSJ			0.5
Balmoral (O.C. Mendez) (PRI-791224)	Brevard Co., FL	I (8/10/94)	L	FSJ	None		5
Brandon Capitol Corp. (PRI-791241)	Brevard Co., FL	I (8/12/94)	L	FSJ			4
General Real Estate (Bal Harbor) (PRI-794539)	Brevard Co., FL	I (10/27/94)	L	FSJ			15
Sarah Bradley (PRI-794555)	Monroe Co., AL	I (12/2/94)	L	RHS			80

PLAN TITLE	LOCATION	STATUS*	COMPLEXITY**	PRIMARY LISTED SPECIES***	PRIMARY CANDIDATES	DATE ASSISTANCE INITIATED	SIZE ACRES
Stallworth Preserve (PRI-796769)	Walton Co., FL	I (2/2/95)	L	CBW		3/93	15
Coconut Point II (PRI-797088)	Brevard Co., FL	I (2/21/95)	L	FSJ			11
Cavelcar Co. (Cloisters) (PRI-798586)	Brevard Co., FL	I (3/28/95)	L	FSJ			104
FWS RCW Coordinator (PRI-798839)	Sandhills Region, NC	I (4/21/95)	M	RCW			300,000
"Safe Harbor"							
Gregory Luce (Lot owner) (PRI-797979)	Baldwin Co., AL	I (4/25/95)	L	ABW			1
RWR Properties (Cypress Creek--Phase I) (PRI-798698)	Brevard Co., FL	I (5/3/95)	M	FSJ			225
Ft. Macaulay Development Co. (Windsor Estates) (PRI-799977)	Brevard Co., FL	I (5/16/95)	L	FSJ			98
Robert Farr (Lot owner) (PRI-798697)	Baldwin Co., AL	I (5/24/95)	L	ABW			0.5
Red Oak Timber Co. (PRI-800149)	Vernon Parish, LA	I (7/17/95)	L	RCW			120
Pinebelt Regional Landfill Authority (PRI-804406)	MS	I (9/22/95)	L	GT			120
Jack Primus Tract (PRI-804465)	Coastal SC	I (10/24/95)	L	RCW			1,500
Aronov (PRI-802986)	Baldwin Co., AL	I (1/26/96)	L	ABW			50
Potlatch (PRI-807592)	AR	I (2/28/96)	M	RCW			233,000
Joseph Hill (Lot owner) (PRI-806150)	Brevard Co., FL	I (4/16/96)	L	FSJ			1.7
Gasque/Felket (PRI-810954)	SC	I (3/28/96)	L	RCW	None		446

PLAN TITLE	LOCATION	STATUS*	COMPLEXITY**	PRIMARY LISTED SPECIES***	PRIMARY CANDIDATES	DATE ASSISTANCE INITIATED	SIZE ACRES
Brett Real Estate	Orange Beach, AL	I (4/18/96)	L	ABM			22
Waterside Down (Cochran) (PRT-800130)	Brevard Co., FL	I (5/21/96)	L	FSJ		11/94	42
Windover Farms/Pineda Crossing	Brevard Co., FL	A	M	RCW		8/94	1,263
On Top of the World	Marion Co., FL	A	M	RCW			1,683
Volusia County	Volusia Co., FL	A	M	NST	None	1/95	50,000
Woolbright Venture (Howard Scharlin)	Indian River, FL	A	L	FSJ			3.2
Sage Development (PRT-811416)	AL	A	L	ABM			25
MacMillan-Blouet	AL	A	M	RHS			4,000

Region 6

PLAN TITLE	LOCATION	STATUS*	COMPLEXITY**	PRIMARY LISTED SPECIES***	PRIMARY CANDIDATES	DATE ASSISTANCE INITIATED	SIZE ACRES
Flandro Quarry (PRT-784336)	Salt Lake, UT	I (2/10/94)	L	APF	none	5/93	30
Heritage Arts Foundation (PRT-798634)	Washington Co., UT	I (3/31/95)	M	DT	Chuckwalla, gila monster	8/94	96
Coleman Company (PRT-804404)	Cedar City, Iron Co., UT	I (9/20/95)	L	UPD	None	1995	3.7
West Hills L.L.C.	Cedar City, Iron Co., UT	I (9/20/95)	L	UPD	None	1995	33
Washington County	Washington Co., UT	I (2/23/96)	H	DT, DPP, WM, VRC, APF, ABE, SPC	27 candidates	9/90	135,000
Smead Manufacturing Company (PRT-814008)	Iron Co., UT	A	L	UPD			29

KEY

Status*

P = plan in progress A = plan completed and permit application submitted
I = plan completed and permit issued W = plan withdrawn and/or application withdrawn
D = permit denied

**Complexity

L = low complexity or small geographic area
M = medium complexity
H = high complexity, multi-species, or large geographic area

*** Primary Listed Species and Primary Candidates

[illegible]

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STATEMENT OF KIMBERLEY K. WALLEY

**TESTIMONY OF KIMBERLEY K. WALLEY
ON BEHALF OF THE BIODIVERSITY LEGAL FOUNDATION**

BEFORE THE COMMITTEE ON RESOURCES OF THE
U.S. HOUSE OF REPRESENTATIVES

(July 24, 1996)

I thank the Committee for this opportunity to testify regarding the "No Surprises" policy which the U.S. Fish and Wildlife Service ("FWS") and National Marine Fisheries Service ("NMFS") (collectively the "Services") has made a part of habitat conservation planning under the Endangered Species Act ("ESA"). I am an attorney with the law firm of Meyer & Glitzenstein, which represents a number of conservation groups that recently sent a "60-day notice letter" to the Services, contending that the "No Surprises" policy violates the ESA. On behalf of the Biodiversity Legal Foundation ("BLF"), one of the groups which submitted the notice letter, I have been asked to testify as to why we believe that the current "No Surprises" policy violates the ESA. I will discuss why the BLF believes the current "No Surprises" policy is a step in the wrong direction for habitat conservation planning and, in particular, why this policy violates the letter and spirit of the ESA. I will then offer some general recommendations regarding the implementation of a "No Surprises" provision as part of habitat conservation planning under section 10(a) of the Act.¹

WHY THE BLF IS CHALLENGING THE "NO SURPRISES" POLICY

A. A Brief Overview of the ESA and the Adoption of the "No Surprises" Policy.

Under the ESA, it is illegal for anyone -- e.g., Federal and State agencies, local governments, and private landowners -- to "take" an endangered or threatened animal. 16 U.S.C. § 1538(a)(1). The term "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. at § 1532(1). Since "[h]abitat . . . is absolutely crucial to species survival," National Research Council, Science and the Endangered Species Act (1995) at vii, the FWS defined "harm" to include "significant habitat modification or degradation" that "kills or injures wildlife." 50 C.F.R. § 17.3. Thus, the "take" prohibition applies to almost any activity that would directly kill or harm a listed species, as well as many activities that cause only indirect harm.²

¹ For the Committee's convenience, attached is a copy of the above-referenced 60-day notice letter. ("Attachment A").

² In Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. ___, 115 S.Ct. 2407 (1995), the Supreme Court upheld the FWS's regulation defining "harm" to include habitat modification or degradation.

Until 1982, there was no mechanism in the Act that allowed for any "take" that might occur "incidentally" during development or other similar activities by private landowners. Thus, in 1982, Congress amended Section 10 of the ESA by adding an exception to the Act's strict "take" prohibition which allowed the Services to issue an "incidental take permit" ("ITP") to a private party, granting that party permission to "take" listed species, provided that the take is "incidental" to "otherwise lawful activity" and is accompanied by a "conservation plan" that has been approved by the Services. Id. at § 1539(a)(1)(B).³

In particular, before the Services may issue an ITP, they must find, after an opportunity for public comment, that (1) "the taking will be incidental;" (2) "the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;" (3) "the applicant will ensure that adequate funding for the plan will be provided;" (4) "the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild;" (5) "the measures, if any, required" by the Services as necessary or appropriate, "will be met;" and (6) the Services have "received such other assurances as [they] may require that the plan will be implemented." Id. at § 1539(a)(2)(B) (emphasis added); see also 50 C.F.R. §§ 17.22, 17.32.

Congress modeled its HCP/ITP exception "after a habitat conservation plan developed by three Northern California cities, the County of San Mateo, and private landowners and developers to provide for the conservation of the habitat of three endangered species and other unlisted species of concern within the San Bruno Mountain area of San Mateo County." H.R. Rep. No. 835, 97th Cong., 2nd Sess. 31 (1982). Congress focused on four main elements of this plan -- known as the San Bruno HCP -- when it enacted section 10. Id. These elements were as follows: (1) the HCP protected "in perpetuity at least 87 percent of the habitat of the listed" species; (2) the plan established a funding program which provided "permanent on-going funding;" (3) the plan established "a permanent institutional structure to insure uniform protection and conservation of the habitat throughout the area;" and (4) there was "a formal agreement between the parties to the plan which ensure[d] that all elements of the plan will be implemented." Id. (emphasis added).

In creating the HCP process under section 10, Congress also "expect[ed] that any plan approved for a long-term permit will contain a procedure by which the parties will deal with unforeseen circumstances." H.R. Rep. No. 835, 97th Cong., 2nd Sess. 32 (1982) (emphasis added). For example, under the San Bruno HCP, the parties agreed that the FWS could impose further mitigation measures on almost 90% of the habitat in the event of unforeseen circumstances. According to the FWS, these modification procedures were important because they would "ensure both that the affected species will be conserved regardless of changed circumstances and that the

³ The conservation plan -- which is otherwise known as a "habitat conservation plan" or "HCP" -- must specify what the impacts of the taking on the species will be and how those effects will be mitigated, how the species will benefit from the plan, and what alternatives the applicant considered and why those alternatives are not being utilized. See id. at § 1539(a)(2)(A).

applicant's activities are not unduly interrupted when the new conditions take effect." 50 Fed. Reg. 39681, 39684 (September 30, 1985). Thus, under the Services' published regulations, HCPs must include specific measures for addressing unforeseen circumstances before a permit may be issued by the FWS. 50 C.F.R. §§ 17.22(b), 17.32(b), and 222.22.

The Department of the Interior and the Department of Commerce significantly revised how unforeseen circumstances are to be addressed in HCPs when they jointly issued a new "policy" entitled "No Surprises: Assuring Certainty For Private Landowners In Endangered Species Act Habitat Conservation Planning" (the "No Surprises" policy) on August 11, 1995. See ("Attachment 1" to Attachment A). This revision was made effective immediately and promulgated without any prior opportunity for public notice and comment. Id.

Under this "new" policy, the Services must provide landowners with the following "General Assurances." First, after an HCP has been approved and an ITP has been issued, the Services cannot even contemplate any additional mitigation measures aimed at conserving endangered or threatened species until they have demonstrated that "extraordinary circumstances" exist that warrant such additional protection. Attachment 1 at 8.⁴

Second, even if "extraordinary circumstances" are shown to exist, the Services "shall not seek additional mitigation" for a species from an HCP permittee where the terms of a properly functioning HCP agreement were designed to provide an overall net benefit for that particular species and contained measurable criteria for the biological success of the HCP which have been or are being met." Id. (emphasis added). Rather, "the primary obligation for such measures" will rest with the Services, "not [] with the HCP permittee." Id.

Finally, even in "extraordinary circumstances," all additional mitigation measures "shall be limited to the original terms of the HCP to the maximum extent possible and shall be limited to modifications within Conserved Habitat areas or to the HCP's operating conservation program for

⁴ Under the policy, the Services bear the burden of demonstrating that "extraordinary circumstances" exist based on the following factors: (1) size of current range of affected species; (2) percentage of range adversely affected by the HCP; (3) percentage of range conserved by the HCP; (4) ecological significance of that portion of the range affected by the HCP; (5) level of knowledge about the affected species and the degree of specificity of the species conservation program under the HCP; (6) whether the HCP was originally designed to provide an overall net benefit to the affected species and contained measurable criteria for assessing the biological success of the HCP; and (7) whether failure to adopt additional conservation measure would appreciably reduce the likelihood of survival and recovery of the affected species in the wild. See id. The Services must use the best scientific and commercial data available and their findings must be clearly documented and based upon reliable technical information. Id.

the affected species." *Id.* Any "[a]dditional mitigation requirements shall not involve the payment of additional compensation or apply to parcels of land available for development or land management under the original terms of the HCP without the consent of the HCP permittee." *Id.* (emphasis added).

Therefore, under this new approach to HCPs, if either (a) circumstances change for listed species which show that changes in the HCP are needed to conserve the species or (b) species which are not listed at time of the HCP are subsequently listed and their habitat falls within the HCP area, the types of, and instances in which, additional mitigation measures may be implemented are substantially restricted. For example, if the FWS finds, after it has entered into an HCP, that a particular species needs certain additional mitigation measures, and the landowner refuses to allow the implementation of those measures, the Service must bear the burden of finding a way to implement the needed mitigation measures. The only way the FWS could then ensure that the mitigation measures are implemented would be to buy the land in question. *See* Attachment 1 (to Attachment A) at 8. However, even assuming the landowner is willing to sell the property, the purchase of lands, especially lands that are attractive to developers, is extremely costly and the Services have offered no assurance in this policy, or anywhere else, that adequate funding will be available to purchase these lands. Indeed, in light of existing budget constraints, such a guarantee is unlikely to be forthcoming any time in the foreseeable future.

Since its enactment, this radical new "policy" -- once again, having been exposed to no public input -- is being applied to HCPs at an dizzying pace. Currently, there are more than 150 HCPs being negotiated nationwide -- all of which must contain assurances under this new policy that all species covered in the plans are considered by the Services to be "adequately" protected by the terms of the plans. *See* Testimony of George Frampton before Endangered Species Task Force of the House Resources Committee on the ESA (May 25, 1995). Many of these HCPs are scheduled to last for up to 100 years, cover tens to hundreds of thousands of acres of land, and assure the continued survival and recovery of hundreds of listed and unlisted ("candidate") species.⁵

In fact, just last week, on July 17, 1996, Secretary Babbitt signed off on the Orange County, California, Central and Coastal Subregion Natural Communities Conservation Plan and HCP which is for a 75-year permit for construction, infrastructure, development, grazing, mining and recreation covering 208,713 acres of which approximately 78% of the total acreage will be allowed to be developed under the project. This plan purports to adequately assure the continued survival and recovery of 47 species, including seven threatened and endangered species and four proposed threatened and endangered species. Another recently approved HCP is the Plum Creek HCP in the State of Washington which covers 170,000 acres, and purports to adequately ensure the continued

⁵ The pace of HCP issuance has accelerated over the years since 1982. While only fourteen HCPs were completed between 1982-92, since 1992, the FWS has completed more than 60 additional HCPs. *Id.*; *see also* Lehman, William, "Reconciling Conflicts Through Habitat Conservation Planning," *Endangered Species Bulletin* Vol. XX, No. 1 (Jan./Feb. 1995) 16, 18.

survival and recovery of 286 species, including the threatened northern spotted owl, wolf and grizzly bear. Yet this plan defers timber harvest on only 2,600 acres of the 170,000 total acres (approximately 15% of the total acreage) for a 20 year period, and the permit is scheduled to last between 50 to 100 years. Another recently approved HCP -- the Balcones Canyonlands HCP in Austin, Texas -- covers 555,000 acres of which up to 60,000 acres are projected to be developed over the 30-year lifetime of the permit. This plan calls for the preservation of 30,428 acres of black-capped vireo and golden-cheeked warbler habitat, and is supposed to adequately protect 44 species. These and other massive HCPs contain the "No Surprises" assurances so that if the plans do not prove to be adequate to protect the affected species it will be almost impossible to revise them.⁶

B. The Current "No Surprises" Policy Flies In The Face Of Sound Science, Realistic Species Management, and Basic Negotiating Principles.

After examining the duration of these HCPs, the acreage that each plan covers, and the enormous numbers of species that are supposed to be adequately protected under each of these plans, one of the most obvious questions raised by the Services' radical "No Surprises" policy is the following -- how can the Services conceivably assure that all of the affected species will continue to survive and recover under the terms of these plans throughout the duration of the permit period? Indeed, it is this very question, and the lack of any reasonable answer to it, that has caused 164 biologists -- including some of the premier conservation biologists in the world -- to write letters to members of this Committee expressing their serious concern that the "No Surprises" approach in habitat conservation planning "does not reflect ecological reality and rejects the best scientific knowledge and judgment of our era." See Letter to Senator John Chafee and Congressman James Saxton from Dr. Gary K. Meffe, Senior Ecologist, Savannah River Ecology Lab, and Professor, University of Georgia, et al. (July 22, 1996) ("Attachment B") at 1 (emphasis added); see also Letter to Senator John Chafee and Congressman James Saxton from Dr. Michael Soule, Professor, University of California, Santa Cruz (June 18, 1996) ("Attachment C").

According to these leading scientists, the "No Surprises" policy is deeply flawed for two interrelated reasons. First, it is extremely unlikely that biological conditions during the life of an HCP, especially an HCP that is expected to last for 50-100 years, will remain static. Indeed, "uncertainty, dynamics, and flux" are the "best descriptors of ecological systems." Attachment B at 1. Some of the sources of uncertainty include "unpredictable, localized environmental events such as fires, disease outbreaks, [and] storms that alter [habitat] structure," "losses or changes of genetic structure in small populations that affect their future adaptability," "the influence of random events

⁴ Other recently approved HCPs include (1) the Fieldstone/La Costa Associates and City of Carlsbad HCP which allows for the loss of up to 1,237.71 acres within a 1,940.2 acre project area over a 30-year permit period, and covers 63 species including four endangered or threatened species; and (2) San Diego Gas & Electric HCP which allows for the loss of up to 400 acres over a 55-year permit period, and covers 110 species including 19 endangered or threatened species and 14 proposed endangered or threatened species. See Attachment 2 to Attachment A.

on survival of very small populations,” and “[i]nsufficient knowledge.” *Id.* at 2. Thus, according to these scientists, their “collective scientific experience indicates that there will be many surprises in conservation planning.” *Id.* (emphasis added).

Uncertainty, however, is not limited to “biological” changes alone; common sense dictates that “political” and “sociological” changes are also likely to change over the course of 50 to 100 years. For example, last year Congress passed the logging rider which required salvage logging of dead, diseased or dying trees without the benefit of any environmental analysis. As a result of this rider, HCPs that had been developed assuming full protection of species habitat within President Clinton’s Northwest Forest Plan are suddenly faced with “changed circumstances” that may affect the status of a species that is covered by an HCP. As such, even the FWS has acknowledged that the rider has thrown these plans “out of balance” thus potentially requiring additional mitigation under those HCPs. See “Rider may cause FWS to revisit HCPs,” Endangered Species and Wetlands Report (March 1996) at 5 (“Attachment D”).

This level of uncertainty is further exacerbated by the fact that many of these HCPs include numerous species, which have yet even to be listed. As to most of these “candidates,” scientists have not even begun to assess what is required for their survival and recovery. Thus, the question arises, how can the measures in an HCP “adequately assure” the continued survival and recovery of a species if scientists do not even know what the needs of a species are when the HCP is approved by the FWS? This very same concern was acknowledged in the Keystone Report, which resulted from a dialogue between FWS officials, developers, and scientists, in which the participants stated that there was a “concern about the application of the ‘No Surprises’ policy to unlisted species if there is no later opportunity to review whether the HCP has contributed to the decline of the species if the species is subsequently listed.” The Keystone Dialogue on Incentives for Private Landowners to Protect Endangered Species (July 25, 1995) at 25. Simply put, there is no way that the FWS can know that mitigation measures in an HCP will adequately protect a species which has been subjected to little or no scientific scrutiny prior to listing.

The biological and political reality of changing circumstances leads to the second flaw identified by the scientists in their critique of the “No Surprises” policy. As circumstances surrounding an HCP and the species it covers are likely to change over the course of an HCP, the logical response would be to revise the management of the plan in response to these changes -- an approach commonly referred to as “adaptive management.” Attachment B at 2. However, the “No Surprises” policy “close[s] the door to adaptive management” by saying that, once an agreement is made, new and better scientific information will not alter it” unless the landowner agrees to the alterations or the FWS finance the alternations. *Id.* (emphasis added).

As a related proposition, the policy also undermines the right of affected individuals and conservation groups to comment on whether, and under what circumstances, an ITP/HCP will be issued. See 16 U.S.C. § 1539(c). Since the policy (which itself was issued with no notice and comment) provides that “no surprises” guarantees will be included in every HCP, regardless of circumstances, it effectively forecloses the public’s ability to “comment” on whether such a

guarantee is biologically advisable and damaging in any particular circumstances. For example, with regard to the Orange County Central and Coastal Subregion HCP, commenters criticized the application of the “No Surprises” policy to the HCP as restricting the FWS’s “no jeopardy” duty under section 7 of the ESA. The FWS responded to this criticism by summarily stating that the HCP accurately reflects the FWS’s new policy.

Indeed, even from the agencies’ standpoint in implementing section 10, it is impossible to comprehend why the agencies have not at least retained the regulatory flexibility to determine, on a case by case basis, whether a “no surprises” guarantee will further the purposes of the Act in any particular instance. Instead, the agencies have, in effect, “shown their cards” before even entering into negotiations with those wishing to take endangered or threatened species. In other words, the policy effectively forfeits the use of a “no surprises” assurance as a bargaining chip to secure better conservation commitments because it mandates that all landowners will have the benefit of these assurances irrespective of the conservation commitments they are willing to make. Now, developers come to the bargaining table expecting that these assurances will be given by the FWS, and even demand that these assurances will cover any species that exists, or may exist, on the land in question. See, e.g., Plum Creek HCP (covers 286 listed and unlisted species); San Diego Gas & Electric HCP (covers 110 species); Central and Coastal Subregion Natural Communities Conservation Plan and HCP (covers 47 species); and Fieldstone/Las Costa Associates and City of Carlsbad HCP (covers 63 species). Hence, the policy not only forecloses case by case public input into the degree to which particular HCPs should be susceptible to new mitigation measures, but it also irrationally ties the hands of the agencies’ own biologists and other officials in negotiating meaningful, biologically sound HCPs.

C. The “No Surprises” Policy Violates The ESA.

In light of the above problems with the “No Surprises” policy, the BLF, along with nine other organizations and individuals, sent a letter to the Services informing them that they violated a number of duties under the ESA when they issued this policy.

1. The “No Surprises” policy violates the Services’ duty to “carry[] out programs for the conservation of endangered species and threatened species.” 16 U.S.C. § 1536(a)(1). In other words, the Services must “use [] all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the Act] are no longer necessary.” Id. at § 1532(3) (emphasis added).

Under the “No Surprises” policy, however, the Services have severely limited both the instances in which they may prescribe additional mitigation measures for the conservation of endangered and threatened species and the types of mitigation measures they may prescribe. Indeed, once a HCP is approved, and an ITP is issued, if the Services find that additional mitigation measures are critical to the continued survival and recovery of an endangered or threatened species, the Services must bear the obligation of implementing those measures. If that is not feasible for any reason, then the species will go extinct.

Such an approach can hardly be described as "provid[ing] a means whereby the ecosystem upon which endangered and threatened species depend may be conserved." 16 U.S.C. § 1536(a)(1). Rather, after an HCP has been approved, measures which are needed to conserve a species and its ecosystem will be allowed only in the exceedingly unlikely event that the landowner/developer agrees to the measures or the Service buys the land in question. Therefore, in adopting this "No Surprises" policy, the Services have effectively foreclosed their ability to "use all methods and procedures necessary" to conserve species, whose habitat happens to fall within an HCP, and hence they have plainly violated their duties under sections 2 and 7(a)(1) of the ESA.

2. This policy violates the Services' duty to "insure that any action authorized, funded, or carried out by [either] agency" -- e.g., an HCP and ITP -- "is not likely to jeopardize the continued existence of any endangered species or threatened species . . ." 16 U.S.C. § 1536(a)(2). Under the section 7 consultation process, if an agency determines that an action "may affect" a listed species, the FWS must prepare a "biological opinion" which "detail[s] how the agency action affects the species." 16 U.S.C. § 1536(b)(3)(A), and sets forth the FWS's opinion as to whether the action is "likely to jeopardize" the continued existence of the species. 50 C.F.R. §§ 402.14(g), (h)(1)-(3).⁷

If the FWS or NMFS concludes that an action is likely to jeopardize a species, the FWS or NMFS "shall suggest those reasonable and prudent alternatives" which, if implemented, would not result in a violation of the Act. 16 U.S.C. § 1536(b)(3)(B). Finally, if formal consultation has already occurred, but new information is brought to light that "may affect listed species or critical habitat in a manner or to an extent not previously considered" or a "new species is listed or critical habitat is designate that may be affected by the identified action," section 7 consultation must be reinitiated. 50 C.F.R. § 402.16.

But, under the "No Surprises" approach, the Services are essentially prohibited from performing any meaningful re-examination of the HCP because the policy predetermines whether additional mitigation measures may be enacted in the first place and, if mitigation measures may be enacted, what kinds of measures may be taken to conserve the species by placing the burden of additional mitigation onto the Services. Such an artificial narrowing of the scope of consultation violates the ESA's mandate that the Services "shall . . . insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered

⁷ Since the decision to issue an ITP is an "action authorized by a Federal agency," the FWS requires all section 10 ITPs to be subject to section 7 consultation. 50 Fed. Reg. at 39683; see also id., citing H.R. Rep. No. 835, 97th Cong., 2nd Sess. 29-30 ("Congress expressly linked [ITPs] with the consultation requirement by including one of the section 7(a)(2) standards as a necessary criterion for issuing an [ITP]"). Thus, according to the FWS, "section 10(a) reinforces the consultation requirement with respect to [ITPs] by requiring a non-jeopardy finding (or a jeopardy finding with reasonable and prudent alternatives that are implemented by the Federal agency or applicant) as a precondition to issuance of a permit." 50 Fed. Reg. at 39683.

species or threatened species . . . " 16 U.S.C. § 1536(a)(2) (emphasis added).⁸

In fact, under the policy, if any new information arises that requires the Services to take another look at the HCP, the standard for reevaluating the HCP and its accompanying biological opinion will not be that the Services shall insure that the action is not likely to jeopardize the species -- as required by the ESA. Rather, the standard will now be that avoidance of jeopardy will be "assured" only where a landowner consents to the measures or the Services have the funds to purchase the land in question. In all other circumstances involving unforeseen circumstances the Service will have to allow the project even if it jeopardizes the species. Thus, under this policy, since the Services can no longer "insure" that the HCPs that they approve are "not likely to jeopardize the continued existence" of an endangered or threatened species, the Services have violated the plain terms and clear purpose of section 7(a)(2) of the ESA.

3. The "No Surprises" policy violates both the letter and spirit of section 10 of the ESA. Under section 10, Congress directed that an HCP may not be approved and issued until the Services find that, among other things, the "conservation plan [] specifies the impact which will likely result from such taking, what steps the applicant will take to minimize and mitigate those impacts, what other alternatives that would not result in the takings were analyzed, and why those alternatives were not adopted." H.R. Rep. No. 835, 97th Cong., 2nd Sess. 29 (1982); see also 16 U.S.C. § 1539(a)(2)(B) ("the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking"). Moreover, the Services must "base [their] determination as to whether or not to grant the permit, in part, by using the same standard as found in section 7(a)(2) of the act . . . that is, whether the taking will appreciably reduce the likelihood of the survival and recovery of the species in the wild." H.R. Rep. No. 835, 97th Cong., 2nd Sess. 29 (1982); see also 16 U.S.C. § 1539(a)(2)(B) ("the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking" and "the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild").

While section 10 plainly requires that an HCP "applicant will, to the maximum extent practicable, minimize and mitigate the impacts" of the taking, 16 U.S.C. § 1539(a)(2)(B), under the "No Surprises" policy, after an HCP has been approved, the applicant no longer must bear the

⁸ As for species that are proposed for listing after an HCP is approved, it is especially hard to imagine how the Services will be able to "insure" that the actions approved in an HCP will not "jeopardize the continued existence" of those species. 16 U.S.C. § 1536(b)(2). As noted above, it is highly unlikely that the Services will have compiled in-depth information regarding what is required to conserve each and every unlisted species "covered" under an HCP. Such information is usually collected during the listing process -- which, for unlisted species, will be conducted after the HCP has been approved and the Services have "assured" the landowners that no additional mitigation measures will be required (unless the landowners agree to the measures). Thus, without this critical information, it is extremely unlikely that the Services will be able to evaluate thoroughly the effects of an HCP on unlisted species and thus assure that these species will always be adequately protected by the plan.

burden of "minimiz[ing] and mitigat[ing] the impacts" of the taking "to the maximum extent possible." Instead, the Services must bear this burden. In addition, since section 10 requires that the Services insure that an HCP and ITP is "not likely to jeopardize" any species covered under the HCP -- and, as discussed above, since the policy violates section 7(a)(2) of the ESA, this policy necessarily violates section 10 of the ESA for that reason as well.

In addition to violating the plain language of section 10 of the Act, this policy also contravenes the purpose of the provision. When Congress enacted section 10, it did not envision such limitations on the contents of HCPs. For instance, the San Bruno HCP, which served as Congress' model, allowed the implementation of additional mitigation measures, regardless of what the landowner/applicant wanted, in almost 90% of the habitat covered in the plan. Thus, Congress intended that an HCP shall contain provisions that allows the Services to accommodate and adjust the management under the plan as "unforeseen circumstances" arise. Congress did not intend for HCPs to ignore changed circumstances simply because the landowner refuses to allow for further mitigation and the Services cannot implement the measures because they cannot purchase the land.

In addition, when Congress enacted section 10, it envisioned that HCPs would "enhance the habitat of the listed species or increase the long-term survivability of the species or its ecosystem." H.R. Rep. No. 835, 97th Cong., 2nd Sess. 31 (1982). Now, under this new policy, the goal of "increas[ing] the long-term survivability" of a species and its ecosystem has been abandoned in favor of providing landowner/developers with a fixed plan that can only be revised if the landowner consents or is paid off by the Services. Thus, instead of the interests of the species driving the HCP process, as Congress had originally intended, the interests of the landowners are now driving the process.

Therefore, in light of the above, the Service's imposition of such limitations on the contents of HCPs, through the implementation of this policy, violates both the letter and spirit of section 10 of the ESA, 16 U.S.C. § 1539(a).

GENERAL RECOMMENDATIONS

Since "[l]oss of habitat is a major factor in species extinction when the cause of extinction is known," it is, now more than ever, critical that habitat conservation planning be based on the best scientific information. National Research Council, Science and the Endangered Species Act (1995) at 58. When done in accordance with Congress' original intent, habitat conservation planning offers the opportunity to preserve and protect threatened and endangered species while, at the same time, allowing landowners a reasonable opportunity to engage in activities that do not threaten imperilled species. To return to that original purpose and in stark contrast to the radical "No Surprises" policy adopted by the Services, we suggest the following approach. First, any policy should be made discretionary, not mandatory -- i.e., as discussed above, it is completely irrational to mandate that every single HCP, regardless of circumstances, must contain "No Surprises" assurances. Such a mandate strips the Services of a powerful bargaining chip during the negotiation process and it ignores the fact that there may be instances in which the Services may not have enough scientific information before them to make these kinds of broad assurances regarding a species survival and

recovery. Instead, as suggested in Dr. Soule's letter, FWS biologists must have the authority to negotiate HCPs -- including the level and extent of assurances to landowners -- on a case by case basis, in light of the specific biological, ecological and other circumstances applicable to a particular situation. See Attachment C at 2.

Second, instead of offering "No Surprises" assurances as iron clad guarantees, any approach to this issue must ensure that an HCP may be modified if the Services can show that unanticipated circumstances have arisen that require further mitigation measures. If the Services can show, based on developments that the parties did not reasonably anticipate at the time the HCP was negotiated, that implementation of additional mitigation measures are needed in order to provide for the continued survival and recovery of a species, the Services must retain the flexibility to revise the HCP/ITP.

This kind of reasonable "reopener" provision -- which essentially establishes a rebuttable presumption that new mitigation measures will not be necessary -- is already a well-established feature of federal environmental law. Indeed, such a provision is regularly found in natural resource agreements negotiated pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") -- in which settling parties agree that the government may require additional contribution from polluting parties for injury to, destruction of, or loss of natural resources, of a type unknown as of the date of the agreement. See, e.g., Attachment E and F (portions of natural resource consent decrees entered into in California by the State of California, the Department of Commerce, and private parties).

CONCLUSION

As Secretary Babbitt stated one year ago in his testimony before the Senate Subcommittee on Drinking Water, Fisheries and Wildlife, "[i]f sound science and wise management of our natural resources guide our actions, we will benefit not only threatened and endangered species, but the human species as well." Testimony before the Subcommittee on Drinking Water, Fisheries and Wildlife of the Senate Environment and Public Works Committee on the Endangered Species Act (July 13, 1995) at 13. However, as the "No Surprises" policy now stands, it ignores the most basic of biological principles -- that "nature is anything but predictable" -- fails to allow for the incorporation of the best scientific information into HCPs, strips the public of the ability to offer meaningful comment on HCPs, and gives away one of the Services' major bargaining chips even before the parties reach the table. Thus, if "sound science and wise management" are truly to guide the government's actions, the "No Surprises" policy, in its present form, must be abandoned. By no means should this ill-conceived policy -- which will hasten, rather than avoid, extinctions -- be codified as a part of any reauthorization of the ESA.

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June 13, 1996

D.J. Schubert
(Wildlife Biologist)

By Certified Mail

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Roland A. Schmitten
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Re: Notice of Violation of the Endangered Species Act In Connection With The DOI and
DOC's Issuance Of An August 11, 1994, Memorandum Which Instituted A New
"Policy" Entitled "No Surprises: Assuring Certainty For Private Landowners In
Endangered Species Act Habitat Conservation Planning"

Dear Secretary Babbitt, Secretary Kantor, Acting Director Rogers, and Assistant Administrator
Schmitten:

On behalf of Spirit of the Sage Council ("Sage"), Leeona Klippstein, The National ESA/HCP
Network, the Biodiversity Legal Foundation ("BLF"), The Fund For Animals, San Bruno Mountain
Watch, David Schooley, Shoshone Gabriellino Nation, Chief Vera Rocha, and Dolores Welty, we
hereby provide notice, pursuant to section 11(g) of the Endangered Species Act, 16 U.S.C. § 1540(g)
("ESA"), that the U.S. Fish and Wildlife Service ("FWS"), and National Marine Fisheries Service
("NMFS") (collectively referred to as the "Services") violated their duties under the ESA when they
jointly issued a memorandum -- without any prior public notice and comment -- announcing a new
"policy" in which the Services substantially revised the rules regarding the revision of approved
Habitat Conservation Plans ("HCPs") under section 10 of the ESA, 16 U.S.C. § 1539.

BACKGROUND

A. Habitat Conservation Planning under Sections 9 and 10 of the ESA, and Its Implementing Regulations.

Under section 9 of the ESA, 16 U.S.C. § 1538(a)(1), it is illegal for anyone to "take" an endangered or threatened animal. See also 50 C.F.R. §§ 17.21, 17.31. The term "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(1). Section 10 of the ESA contains an exception to this strict prohibition under which the Services "may permit, under such terms and conditions as [the Services] shall prescribe . . . any taking otherwise prohibited by section [9] . . . if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." Id. at § 1539(a)(1)(B). This permit is commonly referred to as an "incidental take permit" ("ITP").¹

Neither FWS nor NMFS may issue an ITP unless the applicant submits a conservation plan (known as a "Habitat Conservation Plan" or "HCP") which specifies: (1) "the impact which will likely result from such taking;" (2) "what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps;" (3) "what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized;" and (4) "such other measures that the [Services] may require as being necessary or appropriate for purposes of the plan." Id. at § 1539(a)(2)(A).

The Services "shall issue the permit" if they find, after an opportunity for public comment on the ITP application and the related HCP, that

- (1) "the taking will be incidental;"
- (2) "the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;"
- (3) "the applicant will ensure that adequate funding for the plan will be provided;"
- (4) "the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild;"
- (5) "the measures, if any, required" by the Services as necessary or appropriate, "will be

¹ While Section 10 requires an ITP only for the "taking" of endangered species, the FWS has extended the ITP requirement to encompass threatened species. 50 C.F.R. § 17.32. NMFS, on the other hand, has not extended this requirement to threatened species. Instead, the 5 species listed by NMFS as threatened are protected by special regulations implemented under section 4(d) of the ESA, 16 U.S.C. § 1533(d). See 50 C.F.R. part 227.

met;" and

- (6) the Services have "received such other assurances as [they] may require that the plan will be implemented."

Id. at § 1539(a)(2)(B); see also 50 C.F.R. §§ 17.22, 17.32.

In enacting section 10 of the ESA, Congress modeled section 10 "after a habitat conservation plan developed by three Northern California cities, the County of San Mateo, and private landowners and developers to provide for the conservation of the habitat of three endangered species and other unlisted species of concern within the San Bruno Mountain area of San Mateo County." Id. at 31. Congress focused on four main elements of this plan -- known as the San Bruno HCP -- when it enacted section 10. Id. These elements were as follows: (1) the HCP protected "in perpetuity at least 87 percent of the habitat of the listed" species; (2) the plan established a funding program which provided "permanent on-going funding;" (3) the plan established "a permanent institutional structure to insure uniform protection an conservation of the habitat throughout the area;" and (4) there was "a formal agreement between the parties to the plan which ensure[d] that all elements of the plan will be implemented." H.R. Rep. No. 835, 97th Cong., 2nd Sess. 32 (1982) (emphasis added).

Congress also recognized the need for HCPs to accommodate "unforeseen circumstances." Id. at 31. Indeed, Congress stated that it "expect[ed] that any plan approved for a long-term permit will contain a procedure by which the parties will deal with unforeseen circumstances." Id. In accordance with this intent, both the FWS and NMFS regulations expressly provide for modifications of HCPs in appropriate circumstances. Thus, the FWS regulations contain a provisions which requires the "[i]ncorporation of modification procedures into a conservation plan." 50 Fed. Reg. 39681, 39684 (September 30, 1985). According to the FWS, modification procedures are important because they will "ensure both that the affected species will be conserved regardless of changed circumstances and that the applicant's activities are not unduly interrupted when the new conditions take effect." Id. Thus, under the regulations, HCPs must include specific measures for addressing unforeseen circumstances before a permit may be issued by the FWS. 50 C.F.R. §§ 17.22(b), 17.32(b).²

Finally, since the decision to issue an ITP is an "action authorized by a Federal agency," the FWS requires all section 10 ITPs to be subject to section 7 consultation. 50 Fed. Reg. at 39683; see also id., citing H.R. No. 835, 97th Cong., 2nd Sess. 29-30 ("Congress expressly linked [ITPs] with the consultation requirement by including one of the section 7(a)(2) standards as a necessary criterion for issuing an [ITP]"). Thus, according to the FWS, "section 10(a) reinforces the

² NMFS regulations are essentially the same as the FWS's. See 50 C.F.R. § 222.22. Like the FWS, NMFS also requires that "any plan approved for a long-term permit must contain a procedure by which NOAA Fisheries and the permit holder will deal with unforeseen circumstances." 50 Fed. Reg. 20603, 20605 (May 18, 1990).

consultation requirement with respect to [ITPs] by requiring a non-jeopardy finding (or a jeopardy finding with reasonable and prudent alternatives that are implemented by the Federal agency or applicant) as a precondition to issuance of a permit." 50 Fed. Reg. at 39683.

B. The Service's Joint August 11, 1994 Announcement of Their New "No Surprises" Policy.

On August 11, 1994, the Department of the Interior and the Department of Commerce jointly issued a new "policy" entitled "No Surprises: Assuring Certainty For Private Landowners In Endangered Species Act Habitat Conservation Planning" (the "No Surprises" policy) which significantly revised the rules regarding habitat conservation planning under the ESA. See ("Attachment 1"). This revision was made effective immediately and promulgated without any prior public notice and comment. Id. The Services have also failed to publish this policy in the Federal Register, although it is being routinely applied to HCPs.

Under the "No Surprises" policy, in negotiating the "unforeseen circumstances" provisions for HCPs, the Services must provide landowners with the following "General Assurances." First, after an HCP has been approved and an ITP has been issued, the Services cannot even contemplate any additional mitigation measures aimed at conserving endangered or threatened species until they have demonstrated that "extraordinary circumstances" exist that warrant such additional protection. Attachment 1 at 8.³

Second, even if "extraordinary circumstances" are shown to exist, the Services "shall not seek additional mitigation" for a species from an HCP permittee where the terms of a properly functioning HCP agreement were designed to provide an overall net benefit for that particular species and contained measurable criteria for the biological success of the HCP which have been or are being met." Id. (emphasis added). Rather, "the primary obligation for such measures" will rest with the Services, "not [] with the HCP permittee." Id.

³ Under the policy, the Services bear the burden of demonstrating that "extraordinary circumstances" exist based on the following factors: (1) size of current range of affected species; (2) percentage of range adversely affected by the HCP; (3) percentage of range conserved by the HCP; (4) ecological significance of that portion of the range affected by the HCP; (5) level of knowledge about the affected species and the degree of specificity of the species conservation program under the HCP; (6) whether the HCP was originally designed to provide an overall net benefit to the affected species and contained measurable criteria for assessing the biological success of the HCP; and (7) whether failure to adopt additional conservation measure would appreciably reduce the likelihood of survival and recovery of the affected species in the wild. See id. The Services must use the best scientific and commercial data available and their findings must be clearly documented and based upon reliable technical information. Id.

Finally, even in "extraordinary circumstances," all additional mitigation measures "shall be limited to the original terms of the HCP to the maximum extent possible and shall be limited to modifications within Conserved Habitat areas or to the HCP's operating conservation program for the affected species." *Id.* Any "[a]dditional mitigation requirements shall not involve the payment of additional compensation or apply to parcels of land available for development or land management under the original terms of the HCP without the consent of the HCP permittee." *Id.* (emphasis added).

Therefore, under this new approach to HCPs, if either (a) circumstances change for listed species which show that changes in the HCP are needed to conserve the species or (b) species which are not listed at time of the HCP are subsequently listed and their habitat falls within the HCP area, the instances in which additional mitigation measures may be required, and the type of measures that may be implemented, are rendered virtually non-existent.⁴

DISCUSSION

A. The No Surprises Policy Violates Sections 2, 7, and 10 of the ESA.

1. Sections 2 and 7(a)(1) of the ESA.

According to section 2 of the ESA, the purpose of the Act is "to provide a means whereby the ecosystem upon which endangered and threatened species depend may be conserved . . ." 16 U.S.C. § 1531(b). Conservation is defined by the ESA as "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the Act] are no longer necessary." *Id.* at § 1532(3) (emphasis added).

Section 7(a)(1) requires that the Services "shall review other programs administered by [them] and utilize such programs in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species . . ." *Id.* at § 1536(a)(1). Thus, under section 7(a)(1), the Services "have [an] affirmative obligation to conserve" threatened and endangered species. *Pyramid Lake Paiute Tribe v. U.S. Dept. of Navy*, 898 F.2d 1410, 1417 (9th Cir. 1990).

Under the "No Surprises" policy, the Services have severely limited both the instances in which they may prescribe additional mitigation measures for the conservation of endangered and threatened species and the types of mitigation measures they may prescribe. As discussed above, *supra* at 4-5, once a HCP is approved, and an ITP is issued, if the Services find that additional mitigation measures are required for the continued survival and recovery of an endangered or

⁴ This new "No Surprises" policy has already been incorporated into a number of HCPs -- some of which cover more than 100 species. Attached is a summary of some of these HCPs. *See* Attachment 2.

threatened species, the Services must bear the obligation of implementing those measures.

In addition, the mitigation measures must be limited to modifications within Conserved Habitat areas or to the HCP's operating conservation program for the affected species, and such measures cannot result in the payment of additional compensation by the landowner or apply to parcels of land available for development or land management under the original terms of the HCP without the consent of the HCP permittee. Thus, under this policy, if the Services find that a mitigation measure is contrary to any of the above-described limitations, the measure may not be implemented even if it is deemed by biologists to be critical to the survival and recovery of the species.⁵

Such an approach can hardly be described as "provid[ing] a means whereby the ecosystem upon which endangered and threatened species depend may be conserved." 16 U.S.C. § 1536(a)(1). Rather, after an HCP has been approved, measures which are needed to conserve a species and its ecosystem will be allowed only in the exceedingly unlikely event that the landowner/developer agrees to the measures or the Service buys the land in question. Therefore, in adopting this "No Surprises" policy, the Services have effectively foreclosed their ability to "use all methods and procedures necessary" to conserve species, whose habitat happens to fall within an HCP, and hence they have plainly violated their duties under sections 2 and 7(a)(1) of the ESA.

2. Section 7(a)(2) of the ESA.

As discussed above, supra at 2-4, not only does section 10 employ the "jeopardy" standard under section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), the FWS also requires section 7 consultation for all ITPs. Under section 7(a)(2), each federal agency, including the FWS and NMFS, "shall . . . insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species . . ." 16 U.S.C. § 1536(a)(2).

Under the consultation process, if an agency determines that an action "may affect" a listed species, the FWS must prepare a "biological opinion" which "detail[s] how the agency action affects the species," 16 U.S.C. § 1536(b)(3)(A), and sets forth the FWS's opinion as to whether the action is "likely to jeopardize" the continued existence of the species. 50 C.F.R. §§ 402.14(g)(, (h)(1)-(3).

If the FWS or NMFS concludes that an action is likely to jeopardize a species, the FWS or

⁵ The only way for the FWS to circumvent these restrictions on mitigation measures is by buying the land in question from the landowner. See Attachment 1 at 8. However, the purchase of lands, especially lands that are attractive to developers, is extremely costly and the Services have offered no guarantee in this policy, or anywhere else, that adequate funding will be available to purchase these lands. Indeed, in light of budget constraints, such a guarantee is unlikely to be forthcoming any time in the foreseeable future.

NMFS "shall suggest those reasonable and prudent alternatives" which, if implemented, would not result in a violation of the Act. 16 U.S.C. § 1536(b)(3)(B). Finally, if formal consultation has already occurred, but new information is brought to light that "may affect listed species or critical habitat in a manner or to an extent not previously considered" or a "new species is listed or critical habitat is designate that may be affected by the identified action," section 7 consultation must be reinitiated. 50 C.F.R. § 402.16. Thus, any action that has undergone section 7 consultation and been approved by the FWS may be re-examined if new information is brought to light, and new requirements may be put in place by the FWS to prevent "jeopardy" to the species in question.

But, under the "No Surprises" approach, the Services are prohibiting any meaningful re-examination of the HCP by predetermining whether additional mitigation measures may be enacted in the first place and, if mitigation measures may be enacted, what kinds of measures may be taken to conserve the species. Such an artificial narrowing of the scope of consultation violates the ESA's mandate that the Services "shall . . . insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species" 16 U.S.C. § 1536(a)(2) (emphasis added).⁶

In fact, under the policy, if any new information arises that requires the Services to take another look at the HCP, the standard for reevaluating the HCP and its accompanying biological opinion will not be that the Services shall insure that the action is not likely to jeopardize the species -- as required by the ESA. Rather, the standard will now be that avoidance of jeopardy will be "assured" only where a landowner consents to the measures or the Services have the funds to purchase the land in question. In all other circumstances involving unforeseen circumstances -- i.e., the overwhelming majority of them -- the Service will have to allow the project even if it jeopardizes the species. Thus, under this policy, since the Services can no longer "insure" that the HCPs that they approve are "not likely to jeopardize the continued existence" of a endangered or threatened species, the Services have violated the plain terms and clear purpose of section 7(a)(2) of the ESA.

⁶ As for species that are proposed for listing after an HCP is approved, it is especially hard to imagine how the Services will be able to "insure" that the actions approved in an HCP will not "jeopardize the continued existence" of those species. 16 U.S.C. § 1536(b)(2). For instance, it is highly unlikely that the Services have compiled in-depth information regarding what is required to conserve each and every unlisted species "covered" under an HCP. Such information is usually collected during the listing process -- which, for unlisted species, will be conducted after the HCP has been approved and the Services have "assured" the landowners that no additional mitigation measures will be required (unless the landowners agree to the measures). Thus, without this critical information, it is extremely unlikely that the Services will be able to evaluate thoroughly the effects of an HCP on unlisted species and thus assure that these species will always be adequately protected by the plan.

3. Section 10 of the ESA.

As discussed above, supra at 2-4, an ITP, and its accompanying HCP, may not be approved and issued until the Services find that, among other things, the "conservation plan [] specifies the impact which will likely result from such taking, what steps the applicant will take to minimize and mitigate those impacts, what other alternatives that would not result in the takings were analyzed, and why those alternatives were not adopted." H.R. Rep. No. 835, 97th Cong., 2d Sess. 29 (1982); see also 16 U.S.C. § 1539(a)(2)(B) ("the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking").

In addition, under section 10, the Services "will base [their] determination as to whether or not to grant the permit, in part, by using the same standard as found in section 7(a)(2) of the act . . . that is, whether the taking will appreciably reduce the likelihood of the survival and recovery of the species in the wild." Id.; see also 16 U.S.C. § 1539(a)(2)(B) ("the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking" and "the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild").

The "No Surprises" policy violates both of those requirements. First, while section 10 requires that an HCP "applicant will, to the maximum extent practicable, minimize and mitigate the impacts" of the taking, 16 U.S.C. § 1539(a)(2)(B), under the policy, after an HCP has been approved, the applicant no longer bears the burden of "minimiz[ing] and mitigat[ing] the impacts" of the taking "to the maximum extent possible." Instead, the Services must bear this burden. Second, as discussed above, since section 10 incorporates the substantive standard from section 7(a)(2) of the Act, and the policy violates section 7(a)(2) of the ESA, see supra at 6-7, the policy necessarily violates section 10 of the ESA for that reason as well.

In addition to violating the plain language of section 10 of the Act, this policy also contravenes the purpose of the provision. When Congress enacted section 10, it did not envision such limitations on the contents of HCPs. For instance, the San Bruno HCP, which served as Congress' model, allowed the implementation of additional mitigation measures, regardless of what the landowner/applicant wanted, in almost 90% of the habitat covered in the plan. Under the policy, here, if an HCP only protects 20% of a species habitat in "Conserved areas," then additional mitigation measures will not be allowed (unless the landowner agrees) in the remaining 80% of the habitat.

In addition, when Congress enacted section 10, it envisioned that HCPs would "enhance the habitat of the listed species or increase the long-term survivability of the species or its ecosystem." H.R. Rep. No. 835, 97th Cong., 2d Sess. 31 (1982). Now, under this new policy, the goal of "increas[ing] the long-term survivability" of a species and its ecosystem has been abandoned in favor of providing landowner/developers with a fixed plan that can only be revised if the landowner consents or is paid off by the Services. Thus, instead of the interests of the species driving the HCP process, as Congress had originally intended, the interests of the landowners are now driving the process.

As a related proposition, the policy also undermines the right of affected individuals and conservation groups to comment on whether, and under what circumstances, an ITP/HCP will be issued. See 16 U.S.C. § 1539(c). Since the policy (which itself was issued with no notice and comment) provides that "no surprises" guarantees will be included in every HCP, regardless of circumstances, it effectively forecloses the public's ability to "comment" on whether such a guarantee is biologically advisable and damaging in any particular circumstances. For example, with regard to the Orange County Central and Coastal Subregion HCP, commenters criticized the application of the "No Surprises" policy to the HCP as restricting the FWS's "no jeopardy" duty under section 7 of the ESA. The FWS responded to this criticism by summarily stating that the HCP accurately reflects the FWS's new policy.

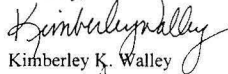
Indeed, even from the agencies' standpoint in implementing section 10, it is impossible to comprehend why the agencies have not at least retained the regulatory flexibility to determine, on a case by case basis, whether a "no surprises" guarantee will further the purposes of the Act in any particular instance. Instead, the agencies have, in effect, "shown their cards" before even entering into negotiations with those wishing to take endangered or threatened species. In other words, the policy effectively forfeits the use of a "no surprises" assurance as a bargaining chip to secure better conservation commitments because it mandates that all landowners will have to benefit of these assurances irrespective of the conservation commitments they are willing to make. Hence, the policy not only forecloses case by case public input into the degree to which particular HCPs should be susceptible to new mitigation measures, but it also irrationally ties the hands of the agencies' own biologists and other officials in negotiating meaningful, biologically sound HCPs.

Therefore, in light of the above, the Service's imposition of such limitations on the contents of HCPs, through the implementation of this policy, violates both the letter and spirit of section 10 of the ESA, 16 U.S.C. § 1539(a).

CONCLUSION

In order to avoid litigation over these violations of the ESA, as well as other violations of law in connection with the policy, we request that the Services rescind their August 11, 1995 "policy" as promptly as possible.

Sincerely,



Kimberley K. Walley



Eric R. Glitzenstein

Attachments

Office of the Secretary

For Release: DOI: Bob Walker, Georgia Parham, DOC: Lauri Arguelles

ADMINISTRATION'S NEW ASSURANCE POLICY TELLS LANDOWNERS: "NO SURPRISES" IN
ENDANGERED SPECIES PLANNING

The Clinton Administration today announced a significant change in policy that will give more economic certainty to landowners involved in reconciling endangered species conservation with land use development.

Landowners who have endangered species habitat on their property and agree to a Habitat Conservation Plan (HCP) under the Endangered Species Act will not be subject to later demands for a larger land or financial commitment if the Plan is adhered to even if the needs of the species changes over time. The term of an HCP can be as long as several decades.

"A DEAL IS A DEAL"

"We're telling landowners that a deal is a deal," Babbitt said. "This 'No Surprises' policy says if, in the course of development or land use, you invest money and land into saving species, we won't come back ten years from now and say you have to pay more or give more."

"The key issue for non-federal landowners is certainty," said Babbitt. "They want to know that if they make a good faith effort to plan ahead for species conservation, and do so in cooperation with the relevant agencies, then their plan won't be ripped out from under them many years down the road."

"We'll work with state, municipal and private landowners to set the rules," said Babbitt. "This assurance policy makes it clear that we won't change those rules in the middle of the game."

"This is a good example of how the Department of Commerce as represented specifically by its National Oceanic and Atmospheric Administration (NOAA) is working with other federal agencies to make the Endangered Species Act work more effectively," said Secretary of Commerce Ronald H. Brown.

"While the Habitat Conservation Plans may not be appropriate in every case, where used, they will provide certainty for Businesses that need to address long-term planning and at the same time provide the flexibility needed to meet the long-term needs of various species," said NOAA's Undersecretary for Oceans and Atmosphere at Commerce, Dr. James Baker, who participated in the press conference today with Babbitt.

NOAA's National Marine Fisheries Service (NMFS) and the Interior Department's Fish and Wildlife Service are the two federal agencies responsible for enforcing the Endangered Species Act. As such, they are also empowered to approve HCPs.

"The assurances offered by this new policy should stimulate greater use of habitat conservation planning to reconcile development and conservation conflicts," said Michael Bean, of the Environmental Defense Fund.

"Successful habitat conservation plans are win-win situations—economic activity continues and our heritage is protected for future generations to enjoy," said John Sawhill of The Nature Conservancy.

POSITIVE REACTION IN THE BUSINESS COMMUNITY

"This new initiative may resolve the business community's most intractable concerns about the Endangered Species Act," said Jim Whalen, a spokesperson for the Alliance for Habitat Conservation, a group of major landowners holding more than 70,000 acres in San Diego County.

"A major impediment to property owner participation in a Habitat Conservation Plan is the fear that, after the costs and resource management restrictions of the Plan are accepted, the rules will change and the entire matter will be reopened," said Don Christiansen, Chairman of the Western Urban Water Users Coalitions. "This policy sets an important new direction by which the key federal agencies are committing to stand by their agreement. In the West, we value that commitment."

The Western Urban Water Coalition's support is significant because it represents 18 major water utilities from seven Western states serving more than 30 million water users. Included are systems serving Denver, Salt Lake City, Phoenix, Las Vegas and other Nevada cities, Portland, Seattle, Los Angeles, San Francisco and numerous other California cities.

"Private forest landowners need stability and certainty to make the long term investments necessary to manage private forestlands," said Charley Bingham, Weyerhaeuser Company's Executive Vice President. "We commend the Secretaries for advancing ideas that will help provide stability forest landowners who develop and implement habitat conservation plans." Weyerhaeuser is currently developing an HCP for spotted owls in Oregon and pioneering a multi-species HCP in Washington.

"Since the inception of the Natural Communities Conservation Plan (NCCP) concept, we have been working with representatives of the Fish and Wildlife Service to develop assurance for landowners which are commensurate with their commitments to habitat protection," said Richard Broming, Vice President of the Santa Margerita Company, a major southern California developer. "This action goes a long way toward providing those assurances and potentially leads to successful negotiation of the NCCPs."

(Under California law, the NCCP process is similar to the HCP process under federal law. NCCPs currently in the drafting stage are designed to meet both state and federal endangered species requirements, thereby allowing for development in areas where threatened or endangered species occur.)

"Lack of certainty has been a major obstacle to large scale private conservation planning," said Monica Florian, Senior Vice President for the Irvine Company. "The concepts outlined in this policy announcement are an important show of good faith that the government intends to live by its commitments in approved NCCPs."

LANDOWNER CONCERNS LED TO ACTIONS

At a June 14 press conference, the two Departments announced a series of policies aimed at improving the Endangered Species Act's effectiveness while enhancing its flexibility for business and private landowners.

Babbitt and Baker said today's announcement was spurred by private, state and municipal landowners, who have complained that, despite their willingness to work with the federal government to protect species on their land, the federal government had been reluctant to assure them in return that an HCP would not be reopened or changed at any time.

In the past, landowners have feared being informed at a later date that despite their earlier good-faith conservation efforts, the demand for additional protection measures for species would halt planned development and land use or result in additional restrictions and require more private funding. Babbitt said today's announcement gives landowners an incentive to get involved in an HCP planning effort by assuring them that the federal government will stick by its deal with the HCP permittees who abide by their conservation commitments in good faith.

The new policy assures that landowners participating in a single- or multi-species HCP will not be subject to additional restrictions or costs at a later time, even if unlisted species adequately covered under the terms of an HCP are subsequently listed as endangered or threatened. If extraordinary circumstances subsequently indicate the need for additional action to protect such species, the new policy states that the obligation for additional action shall not rest with an HCP permittee.

HCP's are authorized under section 10(a) of the Endangered Species Act as a means of reconciling endangered species conservation and habitat protection with private land development that might otherwise be impossible without violating the Act. An HCP requires a landowner to develop a long-term, private conservation program for listed species affected by development or land use, and involves private financial construction to help implement the plan.

Landowners participating in an abiding by the plan are covered by an incidental "take" permit, which gives them immunity from prosecution if a threatened or endangered species is accidentally killed or harmed during construction or land use activities within the boundaries of the HCP.

MORE HCPS AS A RESULT

"The new policy will be good for the endangered species program because it will encourage developers to make substantial commitments to HCP's," Babbitt said. "At the same time, it will be good for the private landowners because they will be assured that they will have time to complete significant development projects or to manage their lands with certainty for years to come, without the possibility of facing additional costs or restrictions for endangered species protection."

Under the new policy, if additional mitigation measures are subsequently deemed necessary to provide for the continued existence of a species in the wild, the primary obligations for such measures shall not rest with an HCP permittee who has been complying in good faith with his or her obligations under an HCP.

PURPOSE:

The purpose of this policy is to provide assurances to non-federal landowners participating in Endangered Species Act Habitat Conservation Planning (HCP) that no additional land restrictions or financial compensation will be required for species adequately covered by a properly functioning HCP in light of unforeseen or extraordinary circumstances.

SUPPLEMENTARY INFORMATION:

The HCP process promotes endangered species conservation and habitat protection within the context of land use or development. Ideally, HCPs contribute to the long-term conservation of federally listed and unlisted species, while providing predictability and economic stability for non-federal landowners.

Species receive a variety of benefits under a properly functioning HCP. Private financial resources supplement limited federal funding, essential habitat areas are often preserved, and comprehensive conservation programs are developed and promptly implemented. Although landowners must ultimately demonstrate that a species has been covered adequately under an HCP, the major benefit from the HCP process from the perspective of the development community is certainty. In exchange for adherence to long-term conservation commitments, an HCP permittee is provided assurance that development may move forward despite the incidental taking of protected species.

Significant development projects often take many years to complete, therefore adequate assurances must be made to the financial and developmental communities that an HCP permit will remain valid for the life of the project. In authorizing the HCP process, Congress recognized that permits of 30 years or more may be necessary to trigger long-term private sector funding and land use commitments for species conservation. Congress also recognized that circumstances may change over time, generating pressure to reconsider the mitigation commitments in an HCP agreement. Often referred to as "unforeseen" or extraordinary circumstances, Congress intended that additional mitigation requirements not be imposed upon an HCP permittee who has fully implemented his or her conservation commitments except as may be provided for under the terms of the HCP itself.

POLICY:

In negotiating "unforeseen circumstances" provisions for HCPs, the FWS shall not require the commitment of additional land or financial compensation beyond the level of mitigation which was otherwise adequately provided for a species under the terms of a properly functioning HCP. Moreover, FWS shall not seek any other form of additional mitigation from an HCP permittee except under extraordinary circumstances.

A. General Assurances Provided to Landowners

- * If additional mitigation measures are subsequently deemed necessary to provide for the conservation of a species that was otherwise adequately covered under the terms of a properly functioning HCP, the primary obligation for such measures shall not rest with the HCP permittee.
- * FWS shall not seek additional mitigation for a species from an HCP permittee where the terms of a properly functioning HCP agreement were designed to provide an overall net benefit for that particular species and contained measurable criteria for the biological success of the HCP which have been or are being met.
- * If extraordinary circumstances warrant the requirement of additional mitigation from an HCP permittee who is in compliance with the HCP's obligations, such mitigation shall limit changes to the original terms of the HCP to the maximum extent possible and shall be limited to modifications within Conserved Habitat areas or to the HCP's operating conservation program for the affected species. Additional mitigation requirements shall not involve the payment of additional compensation or apply to parcels of land available for development under the original terms of the HCP without the consent of the HCP permittee.

B. Determination of Extraordinary Circumstances.

- * FWS shall have the burden of demonstrating that such extraordinary circumstances exist, using the best scientific and commercial data available. FWS findings must be clearly documented and based upon reliable technical information regarding the status and habitat requirements of the affected species.
- * In deciding whether any extraordinary circumstances exist which might warrant requiring additional mitigation from an HCP permittee, the FWS shall consider, but not be limited to, the following factors:
 - the size of the current range of the affected species
 - the percentage of range adversely affected by the HCP
 - the percentage of range conserved by the HCP
 - the ecological significance of that portion of the range affected by an HCP
 - the level of knowledge about the affected species and the degree of specificity of the species' conservation program under the HCP
 - whether the HCP was originally designed to provide an overall net benefit to the affected species and contained measurable criteria for assessing the biological success of the HCP
 - whether failure to adopt additional conservation measures would appreciably reduce the likelihood of survival and recovery of the affected species in the wild

C. ADDITIONAL CONSERVATION AUTHORITY

- * Nothing in this policy shall be construed to limit or constrain FWS or any other governmental agency from taking any additional actions at its own cost with respect to the conservation or enhancement of a species which is included under an HCP.

ATTACHMENT 2

EXAMPLES OF SOME INDIVIDUAL HABITAT CONSERVATION PLANS IN WHICH THE "NO SURPRISES" POLICY HAS BEEN APPLIED

When reviewing the below-described HCPs it is important to keep in mind that, pursuant to the "No Surprises" policy, the FWS has agreed to issue an "assurance" that all species covered in the HCPs are considered by the Service to be "adequately" covered by the terms of the plan. In other words, if the FWS subsequently discovers that any of the species require additional mitigation measures in order to prevent extinction or if any of these species -- that are not already listed under the ESA -- are subsequently listed, the Service may implement such mitigation measures in the event that either (1) the landowner agrees to the measures; or (2) if the landowner refuses to agree to the measures, the FWS purchases the property in question from the landowner. Thus, unless the landowner agrees, at no time will the landowner have to pay for any additional mitigation measures, commit any further land for habitat, or modify the existing mitigation measures under the HCP even if it means jeopardizing the survival and recovery of a threatened or endangered species.

Fieldstone/La Costa Associates and City of Carlsbad HCP:

- Approved on June 7, 1995.
- **Allows the loss of up to 1237.71 acres** within a 1,940.2 acre project area over a 30-year permit period for the development of properties for urban residential uses in the southeastern portion of the City of Carlsbad in San Diego County.
- **Covers 63 species** including four endangered or threatened species and six proposed endangered or threatened species. The HCP allows the taking of between 28 and 30 of the 48 pairs of gnatcatchers (threatened), about 171 of 1,025 individuals of Del Mar manzanita (proposed endangered) and about 1,200 of 7,000 individuals of thread-leaved brodiaea (proposed endangered).
- To mitigate the impacts of this project, the developers and City of Carlsbad have agreed to 702.5 acres of habitat on-site and 240 acres of habitat off-site. This means that in exchange for destroying 1237.71 acres, 942.5 acres of habitat will be preserved.

San Diego Gas & Electric HCP:

- Approved on December 18, 1995.
- **Allows the loss of up to 400 acres** over a 55-year permit period for the use, maintenance, and repair of existing gas and electric lines and the expansion of those systems.
- **Covers 110 species** including 19 endangered or threatened species and 14 proposed endangered or threatened species.

- To mitigate the impacts of this project, SDG&E agreed to the following mitigation measures: (1) develop operational protocols for workers in the field; (2) develop restoration protocols for temporary impacts; (3) dedicate certain fee-owned rights-of-way as corridors for wildlife by only permitting SDG&E activities to occur within the corridors; and (4) establish a conservation bank of approximately 196 acres that may be replenished as needed.

Colton Transmission Line and Substation Project HCP:

- Approved on November 29, 1995.
- Allows the loss of up to 4.6 acres during a 10-year permit period for the construction, operation, and maintenance of electrical transmission line and substation facilities in the City of Colton, San Bernadino County, California.
- Covers four species: (1) the highly endangered Delhi Sands flower-loving fly; (2) the endangered Santa Ana Woolly-star; (3) the endangered slender-horned spineflower; and (4) the Category 1 candidate San Bernadino kangaroo rat.
- The focus of this HCP is on the loss of 4.6 acres of known Delhi Sands flower-loving fly ("DSF") habitat. More than 97.5 percent of the historical habitat for the DSF has been eliminated and the remaining populations of the DSF occur on private lands subject to agricultural, residential, and commercial development, and receive no management. Only one known DSF population has any permanent protection, and this population occurs on a relatively isolated 10 acres of which 4.6 acres will be impacted by the project.
- To mitigate the impacts of this project, the project applicant agrees to acquire, conserve, manage, and restore/improve conditions on 7.5 acres of occupied habitat which directly adjoins the larger patch of occupied habitat at issue. However, according to the FWS, the 7.5 acre proposed reserve is relatively small, is not the ideal shape in terms of conservation strategy, and may not support a viable DSF population in isolation.

Central and Coastal Subregion Natural Communities Conservation Plan and HCP:

- Issued Biological and Conference Opinions on May 24, 1996; final approval pending.
- The 75-year permit for construction, infrastructure, development, grazing, mining, and recreation covers **208,713 acres**.
- Covers **47 species** including seven threatened or endangered species, four proposed threatened or endangered species.

The focus of this Plan is on the loss of 7,444 acres of coastal sage scrub -- habitat that is **critical** to the survival of the threatened California gnatcatcher which has already lost well **over 80%** of its historical habitat. Of the 7,444 acres of coastal sage scrub slated for destruction, 1,217 acres are currently occupied by the threatened gnatcatcher.

June 12, 1996

Safe Harbor Initiative: An Accomplishment Report

I. Successes

To date a total of four initiatives that offer safe harbor assurances to private landowners have been finalized. These initiatives have been extremely successful in the last year or so in garnering private landowner support for the safe harbor concept and promise to provide a wealth of opportunities to benefit listed species. Below we provide a brief overview of each initiative. It is important to note that this approach can provide regulatory assurances to not only large landowners (e.g., timber companies), but also to small landowners. The voluntary nature of the safe harbor concept makes it extremely attractive to private landowners.

A. Sandhills Safe Harbor

The first of these initiatives, the Sandhills Safe Harbor, has been extremely successful. The target species for this initiative is the red-cockaded woodpecker. However, the entire ecosystem and more importantly species associated with this marvelous system will also benefit from these restoration and management efforts. To date 16 landowners have entered into agreements under this initiative with over 10,000 acres of land covered by these agreements. Individual parcels of land range in size from 2.5 to 2,000 acres. Land uses also show a wide range, from farm houses and residential areas to private forests and golf courses. Such a varied land use and ownership is clear evidence that listed species conservation need not to exclude other land uses.

Current Sandhills Safe Harbor Participants

Participant	Land Use	Acreage	Woodpecker Baseline	Expected Increase
Resorts Pinehurst, Inc	golf Course	2000	7	7
William Clark	private forest	2000	4	4
Forest Creek Golf Club	golf course	1263	4	2
Longleaf Associates	golf course	115	1	1
Jerry Holder	private forest	100	0	1
Tony Creed	private forest	140	0	1
Pinehurst No. 8	Golf course	800	0	1
Joseph Rosy	private forest	550	1	1

Participant	Land Use	Acreage	Woodpecker Baseline	Expected Increase
TALAMORE	golf course	335	2	1
Pinehurst Plantation	golf course	180	1	1
J.H. Carter, III	residential	2.5	0	1
Lindsay Taliaferro, Deerpath	house farm	16.96	0	1
Vince Zucchini	residential	8.5	0	1
Country Club of NC	golf course	1850	8	6
Pine Needles Lodges	golf course	760	6	4
Mid Pines golf course	golf course	250	1	1
Tom Wood, Callaway ¹	private forest	2700	5	5
Legacy Golf Links ¹	golf course	570	0	2
McCormick Family Farm ¹	private forest	2700	4	4
M.P. Clark ¹	private forest	1800	3	3
Total		18140.95	47	48

B. Hawaiian Stilt Safe Harbor

The Service entered into a cooperative agreement with Chevron USA, Inc. Hawaiian Refinery under which management actions will be undertaken for maximum Hawaiian stilt productivity. Within the refinery, stilts and other migratory shorebirds utilize ponds and adjacent wetland habitats. Some of these areas represented unavoidable hazards to both Hawaiian stilts and other migratory birds. By providing safe harbor assurances to Chevron, those hazardous areas, which are necessary for safe refinery operations, will be modified to minimize any potential impacts to not only stilts but also to the numerous species of migratory shorebirds. In addition to those actions, Chevron will manage other areas of their property for the maximum reproductive output and population numbers of Hawaiian stilts by modifying current management practices. These areas supported a total of 37 Hawaiian stilts in 1992. It is expected that with proper management the same areas will be able to harbor

Awaits signature

between 60 and 68 stilts. The safe harbor assurances offered under this agreement provide Chevron with the necessary certainty regarding restrictions on their operations while keeping the necessary components for the safe operation of their refinery.

C. Oregon Silverspot butterfly Safe Harbor

This is a great example of how small landowners can obtain regulatory certainty and relief through the safe harbor concept. Mr. and Mrs. Cartwright own a little over 5 acres of land of which 2.88 acres are currently suitable and occupied habitat for the Oregon silverspot butterfly. Given the history of fire suppression of the area this habitat will, in the foreseeable future, become unsuitable for the butterfly. The Cartwrights planned to build a residence on the property, however, they also needed to comply with the ESA. The Service approached the Cartwrights with the prospect of a long-term management scheme with Safe Harbor assurances to accomplish both party's goals: build the residence and enhance and maintain the butterfly's habitat. The Service and the Cartwrights entered into such an agreement with incidental take coverage and safe harbor assurances. Under this agreement the Cartwrights agree to properly manage the 2.88 acres of existing butterfly habitat for the next 30 years and the Service provided authorization for any incidental take and assurances that no future additional restrictions will be imposed on them as a result of their management actions. This example should serve to contrast the Cartwrights story with small landowners horror stories.

D. Texas Gulf Coast Prairies Safe Harbor

This initiative targets the restoration, conservation, enhancement, and maintenance of habitats for the Attwater's prairie chicken, Houston toad, and Texas prairie dawn-flower. These listed species occur on a variety of locations within the 19 counties covered under this initiative. Additionally, 24 other rare and unique Texas Gulf prairie species will benefit from appropriate management actions undertaken by participating private landowners. So far at least 40 private landowners have applied to enter into the program and agreements and site-specific management plans are at various stages of development. These 40 landowners have management control over at least 170,000 acres. Beneficial management of such a significant portion of the Texas Gulf prairies area undoubtedly benefit and enhance the recovery potential of listed species in the area.

II. Future Efforts

The two of the four safe harbor initiatives already in place are expected to continue to add participants for the next several years. The Service will continue to diligently and fairly negotiate with all private landowners to enter into existing safe harbors or to develop new safe harbors to provide the necessary assurances to private landowners willing to benefit listed species through sound voluntary management of their lands. However, within the next few months two new safe harbor initiatives are expected to be developed and finalized. Both

efforts are geographically located in the lower Rio Grande Valley in south Texas. These initiatives are being developed to provide landowners assurances from any additional regulatory restrictions. Target listed species are the aplomado falcon, jaguarundi, and ocelot. Private landowners in south Texas are extremely interested on both initiatives. The Service expects that implementation of these initiatives would greatly enhance the survival of these species and also provide some recovery benefits. Furthermore, these initiatives are also likely to provide benefits to candidate and other unique and rare south Texas species.

III. Potential Controversies

No controversies are expected from any of these initiatives. So far, implementation of the concept has been received extremely well by all affected parties. In the next few months the Service expects to publish a proposed national policy to standardize the implementation of the concept. The publication of public policy can in some cases prove controversial. However in this case we do not expect controversy and comments are expected to be favorable. The recently held Keystone Dialogue serves as an accurate barometer of how different sectors of the public feel about the concept. The participants of that dialogue strongly supported the safe harbor approach. Therefore, implementation of this concept and the development of national policy to standardize the implementation of safe harbors is not expected to become controversial.

STATEMENT OF SHAWN STEVENSON

**STATEMENT OF
THE AMERICAN FARM BUREAU FEDERATION
TO THE
HOUSE RESOURCES COMMITTEE
ON
HABITAT CONSERVATION PLANNING AND
THE FIVE-ACRE EXEMPTION UNDER
THE ENDANGERED SPECIES ACT**

**Presented by
Shawn Stevenson, President
Fresno County Farm Bureau, California**

July 24, 1996

Good afternoon. I am Shawn Stevenson, a citrus farmer and cattle rancher from Clovis, California. I am President of the Fresno County Farm Bureau, and am appearing today on behalf of the American Farm Bureau Federation and the California Farm Bureau Federation. I welcome the opportunity to present testimony on the practical implications of the Habitat Conservation Planning (HCP) process on agriculture from both an industry and personal perspective.

The HCP process, codified at section 10a of the Endangered Species Act, was designed to provide a procedure by which owners of property within the habitat area of an endangered or threatened species could develop their property even if it resulted in the "incidental taking" of members of the species. In return, the plan participant had to agree to mitigate impacts by providing alternative habitat elsewhere, and agreeing to certain terms and conditions on the use of the property within the HCP area. While the concept in theory has an attractive premise, it has not worked with respect to agriculture. I have seen and experienced these problems first hand. The reasons for this dysfunctional relationship will be discussed below.

As an initial matter we would like to emphasize that, given the proper protection or incentives, farmers and ranchers can play an important role in the protection and recovery of listed species. In fact, the agencies *must* have the cooperation of farmers, ranchers and private property owners if the ESA is going to work. A recent report of the Government Accounting Office¹ found that over 90 percent of listed plants and animals have some of their habitat on nonfederal lands, with 78 percent occupying privately-owned lands. Approximately 34 percent of all listed species occur entirely on nonfederal lands. Private landowners and private lands are clearly the key to the Act's success. And farmers and ranchers, who own most of the suitable species habitat, are especially important if the ESA is to succeed.

¹"Endangered Species Act: Information on Species Protection on Nonfederal Lands," GAO/RCED-95-16 (December, 1994)

Farmers and ranchers produce the food that feeds our nation and many others in the world. Farm and ranch lands need to continue to be productive in order to continue meeting this considerable responsibility. The HCP process encourages the opposite effect, by taking agricultural lands out of production by using them as mitigation lands for HCP-allowed urban development. Thus, it is critically important for the continued viability of *all* species, including the human race, that farmers and ranchers continue to be allowed to produce while at the same time maximizing the creation and maintenance of wildlife habitat.

Many farm and ranch activities, if allowed to continue, actually benefit listed species. Many species depend heavily on cultivated land or rangeland for their continued existence. In California, for example, a U.S. Forest Service study recently found that Swainson's hawks nesting in sagebrush habitats more than one mile from cultivated alfalfa fields suffered 100 percent nesting failure, while those nesting within one-half mile of cultivated alfalfa fields enjoyed an 86 percent success rate in rearing broods.

Also, one of the largest nesting colonies of tri-color blackbirds, a candidate species, was recently found in a San Joaquin Valley grainfield. This species was recently determined not to be endangered, specifically because of the numerous colonies hosted by California farmers on their lands -- at no cost to the American taxpayer.

Yet instead of encouraging farmers and ranchers to maintain and improve species habitat on their lands, the ESA actually discourages habitat conservation. The consultation requirements imposed by section 7 of the ESA and the prohibitions against "taking" listed species imposed by section 9 of the ESA often impose blanket restrictions on human activity and land use that create a negative enforcement ethic and a correspondingly negative attitude of landowners toward listed species on their lands.

I speak on this point from personal experience. One of the Pest Control Advisors that I work with found some vernal pools on one of the other farms he works. Vernal pools house various species of listed shrimp. We began talking about the possibility of transplanting some of those shrimp to other farms in order to increase the range and diversity of the populations so that they might be recovered faster. I love wildlife and having species on my farm. However, as much as I would like to take these shrimp onto my farm and enhance their numbers, I would be very concerned about the potential liability under the ESA that I would be creating for myself. If we had an agricultural incidental take program like the Habitat Enhancement Landowners Program or other type of incentive program (described below) I would not hesitate to volunteer to host a listed species on my land.

Farm Bureau believes that endangered species protection can be more effectively achieved by removing disincentives and providing incentives to private landowners and public land users rather than by imposing land use restrictions and penalties. Desired behavior is always more apt to be achieved by providing a carrot rather than a stick. There is no "carrot" provided by the Endangered Species Act as currently written. This is important because it bears directly on the nature of HCPs and why they were authorized.

I. HABITAT CONSERVATION PLANS ARE NOT SUITED FOR AGRICULTURE.

The concept of the Habitat Conservation Plan had its origin in California, and California has more approved or pending HCPs than any other state by far. HCPs were envisioned as a mechanism to allow high-value urban development of species habitat if other habitat were set aside in mitigation. It was designed to give some relief to private landowners from the otherwise absolute "take" prohibitions of section 9 of the Act. As the process developed, mitigation took the form of either purchase or dedication of additional habitat, or payment of a predetermined sum of money into a mitigation fund. In return, the landowner was granted a permit for an "incidental take" of the species if it was in the course of the approved activity.

A. The HCP Process Is Not Affordable For Farmers, Ranchers And Most Small Individual Landowners.

Habitat Conservation Plans came into being in order to accommodate land developers who were otherwise restricted from developing species habitat by the prohibitions of section 9. The HCP process incorporates a series of costly biological surveys and the development of an extensive planning process whose central theme is habitat mitigation. Once developed, the entire package must be approved by the federal government before it becomes operational.

In practice, the HCP process has been costly, cumbersome and controversial. The process requires extensive and expensive biological data covering virtually every square foot of the proposed habitat area. The data collection alone can cost a million dollars. It also requires that a funding mechanism be in place to accomplish the mitigation purposes of the HCP. In addition, the data required under the process often takes several years to accumulate, making the process time-consuming at best.

But even after all of the data requirements have been met and the incidental take application has been accepted, it still must be approved by the U.S. Fish & Wildlife Service, a process which can take several more years. Many applications have been pending with the FWS for several years. Recently, only 40 of the more than 150 Habitat Conservation Plans that had been submitted to the FWS had been approved. Thus, there is no guarantee that a carefully crafted and negotiated HCP will result in FWS approval.

As a result of these factors, the HCP process is generally unsuitable and impractical for small private landowners like individual farmers and ranchers. The extensive data requirements alone price farmers and ranchers out of the HCP process. The mitigation requirements are also much too expensive and burdensome for farmers and ranchers to use on a practical basis.

The Clinton administration has proposed a three-tier process designed to make the HCP process less burdensome for smaller landowners by reducing some of the application burdens. These proposals have merit and address some of the concerns that small landowners have with the process. However, inclusion of these changes in an agency manual is not sufficient to provide the protection or certainty that these provisions will survive. In addition, current law contains such specific incidental take permit requirements that these projected changes might be deemed inconsistent with current law. The changes proposed in the FWS Manual should be

enacted into law as part of a new HCP process.

But even if these changes were addressed in statute, they would not alleviate the concerns of agriculture with the HCP process. The HCP process was not designed to address ongoing activities on land such as agricultural production. Rather, its mitigation policy was designed to accommodate one-time development of property that essentially removes that property as species habitat and replaces it with mitigated habitat. That type of process applied to agriculture serves neither the needs of species or people. Since species depend on agricultural lands for habitat, the goal of an agricultural habitat policy should be to find ways to maximize both agricultural production and species habitat on the same agricultural lands. We believe that such a policy can and will work.

The addition of the concept of "incidental take" was a positive one. The Act must be amended to allow this concept of habitat conservation to be used by everyone, and not only by those who can afford the exorbitant price tag. The current system has created a two-tier exemption program that is available to the super-rich, but not to the smaller businessman or the family farmer and rancher. Family farmers and ranchers are being hurt most by the current application of the Act.

The current provision for HCPs in the Act is too cumbersome and inflexible. The provision and implementing regulations contain fairly specific requirements that perpetuate the problem of making these procedures largely unavailable for most farmers, ranchers and small landowners. Section 10 and accompanying regulations provide such specific and detailed requirements for HCP and incidental take permits that there is little flexibility to adapt the HCP process. In order to achieve the flexibility that is needed for an agricultural HCP process, both the statute and the regulations will both have to be amended.

B. Multi-Party Or Regional HCPs Fail To Adequately Consider The Needs Of Local Agricultural Producers.

Many areas within California are seeking to develop HCPs on a county or regional basis. The advantage to such a process in theory is that such plans will cover a more comprehensive habitat area and will encompass a wider range of normal human activities. Instead of covering one entity or one land use, a regional HCP could cover many different types of normal activities within the HCP area. In practice, these regional multispecies HCPs do nothing to relieve the disincentives for the agricultural landowner, and only increase the conversion of agricultural land to urban uses because of the expensive mitigation such plans require.

The role of agriculture within a regional or multispecies HCP (MHCP) is different from nearly all other affected interests. This is not taken into account in establishing the MHCP or in setting its parameters. These basic differences are of such a nature that affected interests within the MHCP area often benefit at the expense of agriculture. Some of these differences are as follows:

1. Agricultural producers have the most land within a MHCP area but often have very little ready money. Developers and others who might take advantage of the HCP process usually

have money, but very little land. Since the primary focus of the HCP process is on mitigation of habitat loss (involving dedication of additional lands for habitat), agricultural lands become prime targets for those mitigation areas. In California, for example, the mitigation ratio for using native lands as mitigation is 3:1 acre of developed land. The mitigation ratio for using agricultural lands for mitigation purposes is 1:1. The California process thus actively encourages the use of agricultural lands for mitigation purposes under HCPs, thereby further reducing the amount of agricultural lands available for the production of food and fiber. By the same token, agricultural producers generally cannot take advantage of the same process of mitigation.

2. For those HCPs that involve the payment of mitigation fees instead of purchase of mitigation lands by the applicant, developers can pass along the costs to the ultimate users of the property whereas farmers and ranchers cannot. Thus, for most within an HCP area, the mitigation fees is merely a cost of doing business, whereas for the farmer or rancher it is much more.

3. Outside of the specific land that they have targeted for development, developers or the habitat authority itself care little about what land is used or purchased for mitigation purposes. For them, it is almost as if such land is a fungible commodity. However, for farmers and ranchers who actually use the land, every aspect of their land is unique in the role it plays within their operation.

4. Developers can complete their mitigation by the one-time purchase of additional dedicated habitat or the payment of a mitigation fee. The purchase of the additional land or the payment of the fee does not affect the development because the land so purchased or mitigated is outside their development site. Farmers and ranchers, who own most of the suitable habitat within the HCP area, must mitigate by setting aside part of their own property. This affects their ongoing operation. These farmers and ranchers may take more land out of production than they had desired to put in.

5. In most cases developers are engaged in speculative uses of the land that involve future activity and not ongoing present activities. HCP restrictions on land uses within the habitat area that might result from required data collection activities or pending planning decisions only affect the timing of the development of the speculative uses without appreciable impact on present activities. In addition, once those developers have received their permit and finish their projects, they have no additional impacts. Farmers and ranchers, on the other hand, use their property on an ongoing basis so that the same restrictions placed by the HCP authority pending collection and review of data have significant present impacts on current operations. Furthermore, because their operations are ongoing, farmers and ranchers are impacted at every stage and by every decision of the HCP authority. Those impacts include continued liability for compliance with the section 7 consultation requirements and the section 9 take prohibitions.

6. In our experience, the HCP authority also imposes permitting requirements on farmers and ranchers for activities that do not currently require permits. Such activities might include grading, plowing or disking of land -- activities considered normal farming practices that are necessary to the continued use of the land for farming purposes, and which cannot accommodate the uncertainty of the permitting process.

7. Farmers and ranchers often use their property in ways that are beneficial to wildlife and listed species, whereas developers do not. Thus, in many cases farmers and ranchers can actually enhance habitat through application of normal farming practices. Such benefits, however, are generally not considered or explored in the HCP process.

8. Value of land within an HCP area generally goes down simply by virtue of its being included in an HCP. Theoretically, this value can be restored as mitigation opportunities are identified. Since agricultural lands are themselves the very "mitigation opportunities" that developers identify, the value of agricultural land is always less than designated. In the Stephens Kangaroo Rat HCP, the HCP authority became the only "market" for agricultural land, and the "value" of such lands included in the HCP area were at the mitigation fee of \$1,950 per acre -- substantially less than actual market value without the HCP.

A personal experience brought this point home to me very clearly. Not too long ago some land belonging to my family was condemned by a flood control district. A trial determined the value of the land that was taken by eminent domain. The government argued that the presence of vernal pools (habitat for listed shrimp) on the property lowered the value of the property significantly. By the same token, inclusion of property within a HCP is a *per se* declaration that such property is habitat for a listed species, and its value drops accordingly.

The practical impacts of these problems can be illustrated by a few examples.

Pleasant Valley Habitat Conservation Plan

This is the HCP process that I am personally familiar with. The impetus for this plan came from the town of Coalinga in western Fresno County, an area that contains habitat for the listed kit fox, blunt-nosed leopard lizard and the Tipton kangaroo rat. Coalinga is a town of approximately 9,000 people. The Pleasant Valley Habitat Authority sought to have a habitat area of approximately 250 square miles, of which only 2.3 percent encompassed urban uses. Yet the pressure for the HCP was from developers seeking to expand in urban areas. Of the remaining area in the proposed HCP area, 76 percent of the land was either intensive agricultural lands or productive rangelands.

It became apparent that the extensive agricultural acreage was proposed for inclusion in the HCP for only one reason -- to provide lands for mitigation so the urban developers could undertake their projects. The plan was for these productive farm and range lands to be taken out of production and dedicated for habitat for the target species so that others could reap their own benefits. All of the benefits of this proposed HCP were geared to these urban developers, and all the burdens were projected to fall on agriculture. It was clear that there were no benefits to the farmers and ranchers whose lands would have been included in the HCP area.

The Fresno County Farm Bureau objected to the development of this HCP on these grounds, and the HCP did not go forward.

Riverside County Habitat Conservation Plan

Another recent example that illustrates the problems experienced by agriculture in the HCP process involves the Riverside County Habitat Conservation Plan (RCHCP) that is for the protection of the Stephens kangaroo rat.

The RCHCP scheme involves the establishment of a mitigation fund administered by the Riverside County Habitat Conservation Agency. The funds will go in part to purchasing mitigation lands to be dedicated to habitat for the Stephens kangaroo rat.

The mitigation fee that as established was \$1,950 per acre. Payment of the fee and associated costs entitled the owner to make improvements on the property. The fee is the same for both developers and farmers, and therein lies its inequity. Agricultural production is a land intensive business that involves little or no building. Buildings that might be constructed are low density, low cost structures that pale in comparison of value to residential or commercial construction. Yet the mitigation fee is \$1,950 per acre regardless whether the construction is residential, commercial or agricultural.

An example will illustrate the point. A western Riverside County poultry operation constructed a 30,000 square foot agricultural building on 39 acres. The cost of the building was \$340,000. The \$1,950 per acre mitigation fee cost the operation a total of \$67,500, amounting to *approximately 20 percent of the total cost of the building*. On the other hand, a typical subdivision might include four houses per acre, resulting in mitigation fees of \$487.50 per house. If the homes were built for \$100,000 each, the mitigation fee would be *less than .5 percent of the cost of construction*. In addition, the costs of the mitigation fee for residential or commercial development can be passed on to the purchasers of such development. Farmers cannot pass the fee along to anyone.

Farmers and ranchers in the RCHCP area have experienced other problems due to their inclusion in the HCP area. They have been prevented from discing or working their fields due to the suspected presence of kangaroo rats. Even if their lands do not actually contain the species, they are still prevented from using the land until it has been cleared as a possible habitat or mitigation site. Most cannot afford the \$1,950 per acre mitigation fee it would take.

This Committee has heard several horror stories from residents within the RCHCP area on previous occasions. Cindy Domenigoni has testified that the family farm that has been in her husband's family for several generations was prohibited from planting on over 800 acres for three years because the farm was in the RCHCP area and therefore kangaroo rat habitat. It was only after a government official remarked that the species had moved out of their lands earlier that the Domenigonis were allowed to resume operating on that portion of their farm.

The Committee also heard from several victims of forest fires in the area that occurred in 1993. Part of the restrictions for protecting the kangaroo rat habitat involved prohibitions against discing fields and removal of habitat. These prohibitions created conditions conducive to swift fire movement through the area. In addition, the discing prohibitions prevented people from creating firebreaks around their homes to protect their residences. Some people who obeyed the

restrictions lost their homes to fire. Others who ignored the restriction kept theirs.

By and large, the HCP process was designed to facilitate growth on the outskirts of urban areas. Section 10a was written for only the largest landowners who could afford the costs of the process and who could pass the costs on to the ultimate purchasers. The HCP process is poorly adapted to all segments of a community. There are few benefits to farmers and ranchers, if any, from participation in the HCP process as it is currently authorized. The entire process needs to be reviewed and revised.

Another problem faced by farmers and ranchers in California is the deep mistrust that exists between producers and government officials. Relationships between producers and the government have deteriorated to the point where farmers and ranchers do not trust the government to enter the property to perform baseline species population studies or to conduct monitoring of HCP activities -- two basic components of a successful HCP process. At least in California, this process will not begin to be effective until that relationship has been repaired.

While titled "habitat conservation planning," the HCP program deals very little with the conservation of habitat. By focusing on the "incidental take" of individuals of a species as the end result of the HCP process, the program focuses less on habitat development or maintenance than on individual members of the target species. A revised HCP process that truly involves "habitat conservation" and that provides for the unique problems and benefits of the agricultural landowner is called for, and it must be accomplished by legislation.

II. PROPOSALS TO INCREASE THE EFFECTIVENESS OF THE HCP PROCESS AND MAKE IT MORE AVAILABLE FOR AGRICULTURE.

The process for change must begin with a consideration of the American farmer and rancher, and the role they play in the creation, maintenance and development of wildlife habitat. In order to be effective, the new HCP process must provide a "carrot" to the landowners instead of a "stick." For most farmers and ranchers, removal of the "stick" would be welcome enough relief.

Farm Bureau is working at different levels to develop programs that would remedy some of the problems described above.

A. Habitat Enhancement Landowner Program (H.E.L.P.)

In my area in the San Joaquin Valley in California, a coalition of agricultural organizations including the California Cattlemen's Association, the California Farm Bureau Federation and others has developed a proposal called the **Habitat Enhancement Landowner Program (H.E.L.P.)**. The H.E.L.P. program would provide a general incidental permit program for participating agricultural regions. Under the program, participating farmers and ranchers would be allowed to conduct normal farm or ranch activities on their property and receive a general incidental take permit for such activities or for emergency response or repair activities. In exchange for dispensing with the normal section 9 taking prohibitions for such activities on their property, regional committees of farmers and ranchers would agree to develop and

implement actions to improve or enhance species habitat on their lands. It is designed to provide incentives for habitat management by removing the considerable disincentives that currently exist. We believe this program could usher in a new era of farming for food, fiber and the future of wildlife.

As stated, the purposes of the H.E.L.P. program are as follows:

1. To develop a general permit program that will remove current disincentives to habitat protection.
2. Develop a voluntary program that will enable farmers and ranchers to conduct normal agricultural activities, and to undertake additional actions that may benefit listed species, without threat of liability for incidental take under either the state or federal laws.
3. Maximize what willing landowners can accomplish on their property by developing incentive mechanisms that will support species and habitat conservation practices while at the same time maintaining and protecting the long-term economic viability of their agricultural operation.

The program is premised on the fact that farmers and ranchers want to preserve listed species and that given the proper incentives they will do so. For this program, the "incentive" is nothing more than a suspension of the considerable disincentives that currently drive the ESA. The program is also premised on the belief that farmers and ranchers can do a good job in protecting species and their habitat, and that normal farming and ranch activities are generally compatible with habitat protection. California Farm Bureau Federation has been negotiating with the Fish and Wildlife Service and the California Fish and Game Department for adoption of this program.

B. North Carolina Sandhills Habitat Conservation Plan

This limited "safe harbor" agreement is currently in place in Moore County, North Carolina. This program is designed for the protection of red cockaded woodpeckers and their habitat. The major elements of this program are as follows:

1. FWS conducts an inventory of red cockaded woodpeckers (RCW) on the lands proposed for inclusion in the program. This establishes a baseline population.
2. The landowner agrees to manage the lands in such a way as to protect this baseline population, and to conduct habitat improvement activities on their lands. This is accomplished through a cooperative management agreement.
3. There are no additional constraints on the landowner with regard to additional RCW that may subsequently inhabit the lands.
4. As with the H.E.L.P. program, this program is voluntary with landowners. In addition, the RCW program allows landowners to opt out of the program at their option.

5. There will be no additional restraints placed on landowners other than the management activities that they have agreed to undertake. The guidelines to be followed are those in effect at the time of execution of the agreement. Also, the habitat improvements carried out under the agreement will not result in any additional restrictions on the participating lands or neighboring lands.

6. Program participants are responsible for monitoring compliance with the program.

Program administrators believe that even if private landowners opt out of the program after a short time, there will still be benefits to the red cockaded woodpeckers. The red cockaded woodpeckers have been in decline on the private property within the program area for so long that any beneficial habitat enhancement -- however short -- will help reverse that decline.

Although valuable for highly focused species conservation efforts keyed to critical needs of some species, this approach cannot be extended regionally to cover normal activities or for covering multiple species.

The North Carolina program is the only "safe harbor" agreement to be approved thus far. Details on both programs will be provided for the hearing record.

C. Critical Habitat Reserve Program.

In addition to these specific programs, Farm Bureau has developed a proposal for a voluntary program called the Critical Habitat Reserve Program (CHRP) administered by the Secretary of Interior. Under the proposal, the Secretary of Interior would enter into contracts with willing landowners and public land users in areas designated as "critical habitat" for a listed species. The private landowner/operator would agree to implement a plan for management of a listed species on his land and retire acres judiciously from uses that conflict with species management activities. Management plans would focus on actions that would enhance the species instead of blanket land use prohibitions.

In return, the Secretary would provide the costs for implementing the CHR program, pay annual rental and management fees to the private landowners for the conversion of private property to CHR use, and provide technical assistance and management training to cooperating landowners.

The program would be voluntary, and must protect the private property rights of both participants and non-participants alike. The program must contain assurances that participants in the CHRP will not be later restricted in the use of their property outside the terms of their voluntary agreements. Participants who enhance species habitat pursuant to their agreements to the point where other listed species might also take up residence should not be restricted because of the presence of these other residents.

The CHR contract would be for a period of no more than five years, to coincide with the periodic species review mandated by the Act. In order not to de-stabilize the economic base of the community, the CHR would be restricted to no more than 25 percent of the total area of any one county.

The program would also permit the enrollment of land that might already be enrolled in other government conservation programs, and would require consultation between the Secretaries of Interior and Agriculture to ensure harmony between the CHR program and other programs.

We believe that, given the opportunity and proper support from the government, farmers and ranchers can do a better job of enhancing listed species than the government. As experienced, practical land managers who may have observed the species for a number of years, they bring a working knowledge that government scientists do not have. More importantly, they can offer day-to-day management of the species that the government certainly cannot do. Such a program will result in better management and greater chance for recovery of the species than is provided under the current law.

We also believe that with the proper incentives and a respect for private property rights of participants and their neighbors, farmers and ranchers will be willing to participate in the program.

We would be happy to discuss this program with you in greater detail.

All three of these proposals are designed to maximize protection of species habitat while minimizing disruptive impacts to private lands. They are designed to avoid the "train wrecks" caused by species-human conflicts by removing the conflicts. Finally, and most importantly, they are designed to replace the "stick" of negative ESA enforcement through section 7 and section 9 restrictions with a "carrot" approach to habitat management. All sides to these proposals realize that this approach is a "win-win" situation for both species and for people. That is why the North Carolina proposal was in part supported by the Environmental Defense Fund. These changes are designed to encourage landowners protect and enhance species habitat because they *want to*, and not because they *have to*. This simple attitude adjustment makes a world of difference for habitat protection, and may turn the current horror stories of the ESA into success stories.

But these changes will require legislation. Some believe that the current section 10a is sufficient to enact these subtle but important changes, but we have doubts whether the current statutory language would allow such provisions. The current section 10a may work well for the larger landowners and developers, and they may want to retain that section. One thing that Farm Bureau has learned through participation in several HCP negotiating exercises is that different landowners have different interests and goals as far as the HCP process is concerned. We believe that enactment of a separate section to protect agricultural producers and small landowners along the lines outlined in the three proposals above is appropriate and necessary if this nation is to preserve both the capacity to produce food for its residents and protect species from becoming extinct.

III. THE PROPOSED FIVE-ACRE EXEMPTION FOR SMALL LANDOWNERS DOES NOT BENEFIT AGRICULTURAL PRODUCERS.

The Secretary has announced plans to propose a regulatory change that would exempt activities on lands occupied by single family residences and on parcels of less than five acres in

size from ESA restrictions, if the individual or cumulative impacts of the activities will have little or no impact on threatened species. The proposal would presume that such activities on single family residences and on parcels of less than five acres will have such negligible impacts. The proposal can only apply to threatened species, because section 9 of the Act is specific in its application to endangered species, and regulatory language cannot override those prohibitions. The Secretary has greater discretion to prescribe exceptions from the section 9 prohibitions for threatened species. Thus, to be effective and permanent, this exemption should be enacted by legislation instead of regulation.

We believe that adoption of this provision will benefit small landowners and homeowners. Because most agricultural operations involve more than five acres, however, it will not have any appreciable benefits for agricultural producers. It is possible that it could have a negative impact, if releasing small lots of potential species habitat from ESA restrictions will put more pressure to maintain habitat on larger acreage, like farms or ranches. The five-acre exemption, without any agricultural habitat conservation policy, will also encourage the development of five acre "ranchettes" or other such parcelization of productive farm and ranch lands so as to free the land from ESA regulation. The net result is the removal of necessary and productive agricultural lands from agricultural use.

We also believe that this five-acre exemption, considered in tandem with existing HCP provisions and the proposals that we have discussed above for the benefit of farmers and ranchers, might provide a coordinated policy for habitat conservation that will both benefit listed species while at the same time not unduly burden landowners. Elements of all three of these policies will ensure that large developers, agricultural producers, and small landowners will receive appropriate consideration according to their particular situations instead of being thrown together in an unwieldy HCP. A coordinated policy with coordinated local HCPs and H.E.L.P.s or CHRPs will provide the flexibility that is lacking now in section 10a of the ESA.

IV. "NO SURPRISES" POLICY.

The notice announcing the hearing also asked for our comments on the so-called "no surprises" policy announced by the Administration. Under this policy, landowners entering into cooperative agreements for the protection and maintenance of habitat would not be required at some later time to undertake additional mitigation measures for species covered under the plan. In other words, the government would be bound by what it promised in any landowner agreement.

This should be a necessary element of any agreement that any landowner would enter with the government. While it protects landowners from being hit with any additional requirements that they might not have agreed to, it does not begin to solve any of the problems that farmers and ranchers experience with HCPs or with the Act. If anything, even the need for such a policy illustrates the problems of dealing with the government, and the problems faced by farmers and ranchers under the ESA.

CONCLUSION

All of the proposals that we have discussed above benefit different elements of the public and at the same time benefit endangered or threatened species by conserving, managing and enhancing habitat. Different proposals use different methods and benefit different segments of the community. One plan does not fit all.

The HCP program is the only currently authorized program in place. It primarily benefits large developers and some large corporate landowners who can afford mitigation costs. Mitigation might be the appropriate procedure for these interests.

Agricultural interests do not benefit from current HCPs because it is their lands that are eyed for mitigation. Further, they generally cannot afford the mitigation fees that can be paid by large developers and passed on to ultimate purchasers. The CHRP or the broader H.E.L.P. type of agreement is better suited for agricultural concerns.

The five-acre exemption appears suited for small landowners whose activities have marginal impacts on listed species, if any at all. Further thought must be given, however, to preventing unintended adverse impacts on agricultural lands.

We urge the Committee to consider these proposals as a coordinated policy that benefits both listed species and people. It is a situation where everybody wins, and affected interests from all sides should embrace such an effort. Also, demonstrating that the interests of species and people can be accommodated through the enactment of such a coordinated policy might open the door to other necessary ESA reforms.

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LETTER'S SUBMITTED BY GEORGE T. FRAMPTON

MURRAY PACIFIC CORPORATION
 TIMBER PRODUCTS DIVISION
 July 24, 1996.

George T. Frampton
Assistant Secretary for Fish and Wildlife and Parks
Department of the Interior
1849 "C" Street, NW
Washington, DC 20240

Dear Assistant Secretary Frampton:

I appreciate the opportunity to communicate with you once again regarding my thoughts on the Habitat Conservation Planning Process. I am greatly encouraged by the Clinton Administration's success in securing other multi-species agreements with a number of other companies.

As you may remember, in 1992, after a great deal of thought and debate, we decided to proceed forward with a northern spotted owl HCP because 40% of our merchantable timber was tied up due to the fact that we had 3 spotted owls on our property, one pair and a resident single. A single species spotted owl HCP was approved by the USFWS in 1993. Not long after the Agreement, a marbled murrelet flew over the west edge of our property, which in effect locked up the same volume of timber previously lost to the owl, rendering the benefits we accrued with our northern spotted owl HCP meaningless. It was at this point I decided we needed a comprehensive fix or we simply could no longer afford to be in the timber business. Therefore, we set out to develop an "All Species HCP" that would provide certainty to Murray Pacific and fish and wildlife.

It has not been an easy task. However, it has been worth the struggle and I am very proud of what we have achieved, the nation's first "All Species HCP." Murray Pacific pursued their HCP because it was the right thing to do. The right thing for fish and wildlife, and the right thing for Murray Pacific.

The foundation of the Murray HCP is watershed analysis, which is the science that supports best management practices, along with a lot of common sense added. Murray involves the tribes, the agencies, the environmental community, and the general public in their management strategies. This type of approach should give everyone the confidence needed to make habitat conservation planning a successful process. In addition, and over time, the monitoring strategy will demonstrate the success of the approach.

I believe private landowners have a responsibility to make a contribution to the protection of fish and wildlife. We are doing our part through this HCP. It is fair, however, to debate the amount of contribution landowners should make for fish and wildlife. The extent of the contribution should be based on good science and what is practical.

I want to take this opportunity to commend the Clinton Administration's leadership and effort in improving the Habitat Conservation Process and working effectively with a private company like Murray Pacific to successfully complete our HCP. In partnership with the United States Fish and Wildlife Service, Murray Pacific was able to develop a balanced plan that gives certainty to both fish and wildlife and Murray Pacific over the next 100 years.

The HCP process allows landowners and the government to come together outside the court room or a highly charged political atmosphere to seek scientifically based solutions which keep timber companies in business.

As a private landowner, I do not support wholesale changes to the Endangered Species Act (ESA). I believe ESA requires a "tune-up," but is fundamentally sound. First, I would start by changing its focus to Ecosystem based planning as opposed to the species-by-species focus it currently has.

Second, I would recommend you examine developing some implementation steps which give landowners incentives to protect valuable fish and wildlife habitat before the Endangered Species Act comes into play. We need to encourage landowners and the government to take preventative steps which could be far less costly and onerous.

Third, I think we should continue to improve and streamline the HCP process to make it more user-friendly. It is working now, but we can always improve the process to make it less costly and more efficient for small, medium and large landowners.

Fourth, the Clinton Administration and Secretary Babbitt deserve enormous credit for being creative and steadfast in their commitment to providing certainty to landowners who develop HCP's. For Murray Pacific to agree to the management and

financial commitments of the HCP Amendment, it must have reasonable certainty that it can absorb the costs and yet remain economically viable over the term of the HCP.

Lastly, the Administration and Congress need to ensure that the law is clear, justifiable, consistent, and applied equally to everyone. As a landowner who has developed an HCP under the Endangered Species Act, I am adamantly opposed to any landowner being exempted from the Act unless they qualify as a "small landowner" that does not significantly impact fish and wildlife or its habitat. Granting an exemption to some companies and not others is wrong, unfair and would put Murray Pacific and other companies that have completed HCP's at an unfair competitive disadvantage.

In summary, I urge you and the Congress to continue to support habitat planning or like processes. It is essential to keep the momentum going—it is abundantly clear that the industry and the environmental community are coming together in developing sound scientific plans that will benefit fish and wildlife while at the same time providing the certainty needed to attract capital for the 50–60 year investment period required in forestry. As the Administration and Congress have stood firm against those more conservative elements in the timber industry who would turn back the clock, it must with similar fortitude say "no!" To those in the environmental community who complain that these HCP's do not go far enough.

Do the right thing—keep the process voluntary and objective! While I would recommend changes to the HCP process, I remain supportive of the HCP process.

Sincerely,

L.T. MURRAY, III
Vice President, Murray Pacific Corp

PORT BLAKELY TREE FARMS
500 UNION STREET, SUITE 830
Seattle, Washington, July 24, 1996.

George T. Frampton
Assistant Secretary for Fish and Wildlife and Parks
Department of the Interior
1849 "C" Street, NW
Washington, DC 20240

Dear Assistant Secretary Frampton:

I want to take this opportunity to thank you for the excellent work of the United States Fish and Wildlife Service (USFWS) in the development of the Port Blakely Habitat Conservation Plan (HCP). The efforts of the Clinton Administration and the Service are to be commended.

I believe the Port Blakely multi-species HCP demonstrates that government and the private sector can work together to achieve balanced solutions to challenging natural resource issues. The plan we negotiated with the USFWS and the National Marine Fisheries Service (NMFS) protects critical fish and wildlife habitat and allows for sustainable forestry practices. We believe our approach reflects our long-term commitment to maintaining and enhancing habitat throughout the forest management process and we welcome the regulatory certainty that it will provide our company, its investors, employees and contractors for the next 50 years.

Upon reflection I believe it is critical that the Clinton Administration and the Congress continue to support and encourage other landowners to pursue HCP's. We represent the third major timber company in Washington State to complete an HCP. These three HCP's represent over 230,000 acres of private timberland that are important to fish and wildlife habitat and commercial forestry which employs many people in our state. However, I am hopeful that what these HCP's really represent is an end to the bitter and divisive battles we have too often engaged in when managing our forestry lands. The HCP process gives one hope that we can voluntarily negotiate and agree on scientifically credible, legally defensible and practical plans to protect fish and wildlife without destroying the forest products industry.

While I strongly support the HCP process, we can and should take action to streamline the process, make it more affordable and create more financial incentives for the landowners to protect habitat. I would urge you to vigorously pursue action to assist the small landowners in developing a process that meets their needs as well. Finally, I would encourage you to remain firm in this administration's commitment to providing certainty to landowners who develop HCP's. Providing such certainty was an essential incentive to Port Blakely and without it we would have not pursued our multi-species HCP.

I would like to thank you and all the administration for demonstrating leadership, creativity, and commitment to the HCP process. Your efforts have truly make a difference and been effective in advancing our company's HCP. Please continue your efforts to bring people together in a voluntary and non-confrontational manner to solve our Nation's environmental challenges.

Very truly yours,

JAMES E. WARDEN
Chairman & General Partner
Port Blakely Tree Farm

LETTER SUBMITTED BY THOMAS KAM

AUSTIN CITY COUNCIL
AUSTIN, TX, APRIL 10, 1995.

Travis County Commissioners' Court
P.O. Box 1748
Austin, TX 78767

Subject: Balcones Canyonlands Conservation Plan (Shared Vision)
Council Members, Mayor, County Judge, and County Commissioners:

Attached are a list of recommendations approved by the Community Conservation Plan Working Group which was tasked with providing constructive input on the latest regional plan to balance development and endangered species protection (BCCP Shared Vision). Our Working Group was composed of members representing a variety of interests in the landowning, development, and environmental communities. We worked hard to develop recommendations that were acceptable to all members of the group. Most of the recommendations are unanimous.

We continue to believe that a regional approach to the endangered species issues is the best one for our community. In spite of our recommendations, we share a concern about the financial viability of the plan. We hope you will continue to explore every possible funding source in an effort to ensure that all landowners, including those within the preserves, are treated fairly and that the preserve acquisition time is reduced to the minimum possible. We also recognize that other factors beyond our control, such as changes to the Act itself or court decisions can impact the plan's foundation. In this regard, the plan needs to remain flexible in order to accommodate future political and legal changes.

We appreciate your willingness to provide the opportunity to comment on this plan before any final action was taken and are hopeful that our input will be helpful and constructive. If you have any questions, please feel free to contact me or any other members of our committee. A list of members.

Sincerely,

VALARIE SCOTT BRISTOL
Travis County Commissioner
GUS GARCIA
Austin City Council Member
DAVID ARMBURUST
Austin Real Estate Council
ALAN GLEN
Greater Austin Chamber of Commerce
BRYAN HALE
Travis Audubon Society
RUSSELL R. HYER
National Wildlife Federation
JUDY JENNINGS
Bull Creek Foundation
LARRY MCKINNEY
Texas Department of Parks & Wildlife
CRAIG SMITH
Austin Sierra Club

LONNIE MOORE,
 13427A RANCH ROAD 2769,
 Austin, TX, April 17, 1995.

To: Members Austin Planning Commission,
 Members Austin City Council,
 Members Travis County Commissioners Court

Re: Balcones Canyonlands Conservation Plan (BCCP)

I served as the "landowner representative" on the BCCP Working Group chaired by Commissioner Bristol. I voted in favor of almost all the recommendations approved by the Group. These recommendations would make an acceptable plan better. However, this version of the BCCP is unacceptable.

The BCCP should not be put into place without first successfully addressing its fatal flaw-financing. The current Plan is (1) based on highly questionable financing assumptions and (2) In its best case, patently unfair to landowners within the preserves. I cannot endorse a Plan which is based on the assumption that remaining land can be acquired at an average of \$5,500 per acre or contemplates taking anywhere near 20 years to compensate all the preserve landowners affected.

I have not yet seen the final results of Tom Kam's survey of preserve landowners. Preliminary figures show an average owner evaluation of almost \$30,000 per acre! Even if the owners inflated their values and the BCCP could acquire the land for *one-third* what owners would like to get, that is still \$10,000 per acre, almost twice what the Plan allows for. Trying to finance the Plan principally on development fees will result in financial failure and thus failure to complete the preserves. That failure might take 2-3 years to become apparent, resulting in favoritism to early certificate users (i.e., certain developers) and a bad situation for almost everyone else. And even attempting to hold preserve landowners hostage for 20 years will result in lawsuits, some almost certainly successful and all costly. Such a flawed plan will also, sooner or later, help cause additional legislative changes which will be the opposite of what BCCP proponents would wish.

The Working Group was not given any means to address the underlying financial problems of the Plan. The Austin City Council and any other prospective regional permit holders should not ignore these problems. The Austin City Council and any other permit holders should not go forward until they can address these fundamental issues.

Thank you,

LONNIE MOORE

SOME POINTS ABOUT THIS BCCP FROM LONNIE MOORE (LANDOWNER
 REPRESENTATIVE ON WORKING GROUP) APRIL 17, 1995

- Landowners have always felt left out of the process. Putting one landowner representative on the Working Group late in the process does not make up for years of being ignored.
- Landowners are suspicious of the motivations of Plan proponents. Frequently heard is that USFWS is desperate for a success story to aid re-authorization of the ESA. So desperate they will condone and even promote a Plan which, by all indications, will fail financially and possibly biologically as well.
- Landowners are also suspicious that developers and their representatives will promote the Plan, get their certificates quickly and clear their land as soon as possible. When the Plan unravels financially (perhaps 2-3 years before it becomes apparent), it will be too late to stop them but their competitors will be thwarted by the lack of a continuing, viable regional plan.
- Landowners *within* the proposed preserves feel they would be better off without the Plan. Despite what USFWS may say, preserve landowners believe that without a Plan they may be able to realize some use or value for their land. Once the Plan is started, these preserve landowners are trapped in the process because the integrity of the preserve *must* be maintained or the entire regional plan is jeopardized.
- Many landowners feel they are asked to pay for preserves that benefit the community at large and should be paid for by everyone. In reality these lands are as much parks as preserves.
- The "cookbook" approach, assigning per acre fees to the gross site acreage, may have an undesirable side effect. Since the developer must pay fees on the entire tract, not just on land utilized, he/she is encouraged to develop as densely as possible in order to spread the fees over more homes or commercial property. This higher density can have a detrimental effect on traffic, neighborhoods and water quality.

- All the cheap land (e.g., RTC owned) has already been obtained for habitat. The remaining 10,000 acres will be very much more expensive. It will certainly cost more than the estimated average of \$5,500 per acre. Please see Tom Kam's landowner survey.

- Even in a best case scenario—one that assumes the County will contribute \$10M—it will still take 20 years to acquire the remaining habitat even using the (low) estimated \$5,500/acre figure, 20 years is far too long (by about 15 years) to leave landowners in limbo, unable to develop or realize value for their land. Not only is this unfair, it will make the City of Austin the target of lawsuits and possibly of even more Austin-controlling legislation. Right now USFWS is the “bad guy” on the ESA; does Austin want to take on the role?

- The ESA will almost certainly be changed by legislation and/or by pending Supreme Court decisions. Is it necessary to go forward now, when such changes might severely alter any such plan? After 7 years or more, why not wait a little longer?

LONNIE MOORE

STATEMENT OF WILLIAM R. BROWN

Good afternoon Mr. Chairman and members of the Committee. My name is William R. Brown. I am Vice President, Resources, for Plum Creek Timber Company, based in Seattle, Washington. I am accompanied today by Dr. Lorin Hicks, Director of Fish and Wildlife Resources, for Plum Creek. I appreciate the invitation of this committee to discuss our recently completed Cascades Habitat Conservation Plan with you today. I have provided more detailed information about the HCP in attachments to my statement.

The HCP was approved on June 27, 1996 and announced in a formal ceremony in Seattle attended by Secretary of Agriculture Dan Glickman, Regional Director of the U.S. Fish and Wildlife Service Michael Spear, Regional Director of the National Marine Fisheries Service William Stelle Jr. and others from the Administration. The Plan has been endorsed in editorials by the major newspapers in Seattle and others in the region. And, Plum Creek gratefully acknowledges the bipartisan support this effort has received from Members of the Washington Delegation.

The Administration, Secretary of Interior Bruce Babbitt, Assistant Secretary George Frampton and the Fish and Wildlife Service are to be commended for their commitment to the HCP process, generally, and the Plum Creek Plan, specifically. We believe habitat conservation plans provide a useful mechanism for private landowners to work within the current structure of the Endangered Species Act. This is not to say, however, that we cannot improve on the current system. We have learned much from this process and hope that we can help this Congress identify critical areas for reform to ease the regulatory burdens on private landowners of all sizes and types.

While the attention today is on the HCP, Plum Creek also completed a landmark conservation agreement last year with state and federal agencies in Montana to address grizzly bear habitat concerns in the Swan Valley of Montana. The HCP and the Grizzly Bear agreement are extensions of the policies and principles of Plum Creek that reflect the latest scientific advances in forestry and timber practices. These efforts are win-win solutions to complex problems confronting private landowners which also provide scientifically based protections for wildlife.

Background

The Central Cascades HCP encompasses 170,000 acres of Plum Creek land in the central Cascades Mountains of Washington. The area covered by the Plan totals 418,000 acres in which Plum Creek lands form a "checkerboard" pattern with federal lands and other smaller private owners. These lands contain one of the most dense spotted owl populations. Many other species commonly occur, including goshawks, bull trout, and salmon. Grizzly bears, wolves and marbled murrelets may also occur in the foreseeable future.

In addition to endangered species populations, the so-called I-90 corridor is dominated by pressures from heavy recreational use, other environmental issues, and encroaching population growth. Without a comprehensive solution to the myriad of resource issues that we face, our ability to manage our long-term timber assets in this area would be uncertain at best. To understand why Plum Creek elected to take on the arduous and expensive development of an HCP, two business "realities" must be understood: Plum Creek's landownership pattern and the impact on the company of existing and future regulations under the ESA should additional species become listed.

Nearly all of Plum Creek's 2 million acres in Montana, Idaho and Washington is intermingled with state and federal land in a checkerboard ownership pattern of alternating square-mile sections. This ownership pattern stems from the 1864 railroad land grants to Plum Creek's predecessor companies. Checkerboard ownership puts Plum Creek's property in close proximity to, and sometimes in conflict with, federal land management direction for U.S. Forest Service and BLM lands. This is especially true for areas where the federal government is directed to maintain large areas of late successional and old growth habitat for spotted owls, recreation, and other public values. This checkerboard pattern complicates landscape planning for all parties and often results in forest management conflicts.

Regulatory Framework

Since the spotted owl was federally listed in 1990, we have been subjected to a gauntlet of spotted owl "circles and surveys" to which we must adhere in order to harvest private timber in spotted owl habitat. In the I-90 corridor where Plum Creek completed the HCP, thousands of acres of the company's most productive forestlands were constrained by over 100 spotted owl management circles, within which at least 2,600 acres of habitat must be preserved for every nesting pair of owls. In fact, Plum Creek harvest units were overlapped by as many as 5 different circles.

Survey requirements to locate and document all spotted owls in the vicinity of our harvest units required Plum Creek to hire 13 biologists to do nothing but survey for spotted owls. As owls pairs moved from year to year, the owl circles moved with them, contributing to even more regulatory uncertainty.

In addition, the overlapping and sometimes contradictory regulations imposed on private landowners by federal and state agencies created two different and unstable "playing fields" and the problem was getting worse. During the 2 years Plum Creek completed the HCP, the federal government had yet to finalize its regulatory requirements for "circles and surveys," while the State of Washington was proposing its third round of spotted owl rules in 5 years. The number of spotted owl sites impacting Plum Creek lands increased from 103 to 108; and, making matters worse, 6 additional wildlife species were added to the candidate list for federal listing.

So it was our decision, and I want to emphasize that it was a business decision, to begin HCP negotiations with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service in 1994. The concept of an HCP is very simple: prepare a land management plan that mitigates for the potential impact to a listed species and in exchange receive a long-term permit to manage your land by the terms set out in the HCP.

Description of the Habitat Conservation Plan

Our HCP is significant in that it not only mitigates for spotted owls and three currently listed species (grizzly bears, grey wolves and marbled murrelets), but 281 other species found in the area. The plan is an ecosystem-based management plan that will provide and protect a diversity of forest habitats to address the needs of all fish and wildlife species known or suspected to occur in the area. It is multi-species, habitat-based in its approach. In effect, we have agreed to provide benefits for numerous wildlife and fish species even before they reach the point where they may need to be listed under the ESA.

The objectives of the HCP were to:

1. Provide Plum Creek with predictability and flexibility to manage our timberlands economically while contributing in a meaningful way to the conservation of the covered species;
2. Minimize and mitigate the impacts of any "take" of species incidental to lawful timber harvest and related forest management activities; and,
3. Provide habitat conditions to conserve the ecosystems upon which all species in the Planning Area depend.

Management Strategies

As I previously indicated the Plan not only addresses spotted owls, but it includes management strategies for the marbled murrelet, grizzly bear and grey wolf, which are listed species. In addition, the HCP will provide protections for 281 other species which have been grouped into 16 lifeforms. The following is a brief description of the various management strategies in the Plan.

Northern Spotted Owl

- Provide a minimum of 8% nesting, roosting and foraging habitat throughout the Permit period.
- 5,800 acres have been identified which will be deferred from harvest for 20 years or selectively harvested to maintain nesting and dispersal habitat to support key owl sites.

- Protect and maintain 10,900 acres in riparian areas to provide spotted owl nesting and dispersal habitat.
- Conduct small mammal surveys and spotted owl demographic surveys to ensure protection efforts and experimental harvest treatments are maintaining spotted owl habitat.

Marbled Murrelet

- Defer harvests on 257 acres of potential nesting habitat while surveys are completed to identify possible murrelet nesting activity.
- Protect occupied stands found during survey period.

Grizzly Bear

- Use a "phase in" approach to provide some protection today, but increase protection in the future when grizzlies are confirmed to use the area.
- Phase 1. Restrict public use; reduce open road densities; provide visual screening on open roads and prohibit firearms in Company and contractor vehicles.
- Phase 2. Increase road management actions; provide cover in harvest units; restrict timing of operations during anticipated bear use.

Grey Wolf

- Protect den sites with operational restrictions and road closures.
- Provide for maintenance of prey populations (e.g. deer, elk, snowshoe hares) by managing habitat and maintaining road closures.

Lifeform Support

- 281 other species prioritized by legal status (e.g. candidates for listing) and grouped into 16 lifeforms based on similarities in breeding and feeding habitat preferences.,
- Current status and 50 year habitat trends for each lifeform discussed and displayed graphically in the HCP.
- Management guidelines for special habitats (e.g. snags, wetlands, talus slopes, caves) needed by these species are identified in the HCP.

Riparian Management

- State Forest Practices Rules and Regulations will continue to guide some actions (e.g. culvert sizing, chemical applications).
- Watershed analysis will be completed on 20 watersheds in the Planning Area within 5 years.
- Protective buffer strips in Riparian Habitat Areas and Wetland Management Zones designated on 12,000 acres vary from 100 to 200 feet in width.
- Harvest deferred on 667 acres of 303(d) water quality-limited stream segments until completion of watershed analysis.
- An aquatic resources monitoring program will evaluate the success of the riparian management strategy on stream habitat and fish populations.

A more detailed description of the HCP is included with the testimony as Attachment 1.

I would like to discuss three aspects of our land management and HCP of specific interest to the Committee:

1. Why did Plum Creek decide on an HCP?
2. Cost, implementation and benefits of the Plan.
3. Additional actions by Plum Creek to address access and land exchange.

Why Did Plum Creek Decide On An HCP

We were motivated to provide the level of benefit in the Plan for two reasons: The first is due to the commitment made by the government to add species covered by our HCP should they ever be listed in the future, in effect a "prelisting" agreement. The second was the commitment of the government to not impose additional costs on the company except in extraordinary circumstances. This simple concept, known as the "Deal is a Deal" or "No Surprises" policy, was instrumental in the development of this Plan.

Cost, Implementation and Benefits

The company invested 2 years and over \$1.3 million dollars in the development of this HCP. I want to again emphasize that this was a business decision, designed to produce a stable regulatory environment for the Company's long range planning. However, the public clearly benefits from this business decision. To obtain this regulatory predictability, Plum Creek will exceed virtually every state and federal standard for environmentally acceptable timber harvest in exchange for stability to

plan harvests and obtain acceptable return rates on our timber resources over a 50 year period.

The prelisting agreement and the "No Surprises" policies, criticized by many, are the most important elements of our agreement with the federal government. Without them, there is no incentive, commitment or contract. The unique partnership of Plum Creek and the federal government to protect public resources and provide an end to the "timber wars" was created by these two policies and is what led four of the Northwest's leading newspapers to editorialize in support of our HCP last month.

This HCP is the product of two years of scientific work and unprecedented public input. In addition to the public input normally required under the National Environmental Policy Act (NEPA), Plum Creek sponsored over 50 meetings and briefings to explain the HCP and solicit comments and recommendations from a diverse array of "stakeholders" such as environmental groups, federal, state and local regulators, timber interests, landowners and elected officials.

Plum Creek began the research that supports this plan in the 1980's which includes extensive field surveys, telemetry data and silvicultural experiments. Additionally, the development of the HCP has been a science-driven process, involving the work of over 20 scientists and technicians, with review and input of 47 outside reviewers. The scientific work, however, is just the beginning. Watershed analysis will be completed in 20 watersheds within the next 5 years and the size of the forested streamside buffers will be determined by each specific analysis, not by a "one size fits all" rule. It is important to note that the implementation, research and monitoring costs associated with the HCP are covered by the Company. The federal government is not being asked to "subsidize" this plan.

While the 50-year term of the Plan may seem long to many, this is not a long time for a timber company or for the life of a forest. An obvious difficulty of designing a long-term ecosystem, habitat based plan of this duration is the dynamic nature of natural systems and the limitations on scientific knowledge and modeling capabilities. We have taken these issues into account by incorporating the on-going use of "adaptive management." No other HCP to date has included such a creative concept -- which includes a program of monitoring, surveys, reporting and cooperative research to evaluate biological relationships and habitat responses. Attachment 2 to our testimony describes adaptive management and its role in Plum Creek HCP.

Mr. Chairman, you requested information on set-asides and other considerations embodied in the HCP. In addition to the commitment to manage our land in such a way that there will be adequate habitat for a diverse array of species, there are over 30 separate mitigation measures outlined in the plan to address diverse concerns ranging from streamside protection to spotted owl habitat. A few quick examples may illustrate the multi-faceted aspects of this plan.

Plum Creek has agreed to defer harvest on 2,600 acres of spotted owl nesting habitat for at least 20 years in order to protect productive owl sites and "bridge the gap" between short-term habitat loss and long-term recovery of habitat on federal lands. The Company has also agreed to selectively harvest 3,200 acres in order to maintain habitat "connectivity" between late-successional forests on federal land in this complex checkerboard ownership. Plum Creek has also agreed to provide 200-foot forested buffers along fish bearing streams where current regulations require only 25 foot buffers. These buffers benefit a wide variety of fish and wildlife species, and represents millions of dollars of timber at today's values.

Based on Plum Creek's management principles and our history of research and application of science, Plum Creek was uniquely positioned to undertake and implement an HCP of this nature. We believe it can serve as an example of how to protect diversity and the health of ecosystems while giving businesses the predictability needed to serve the interests of employees, customers, shareholders and local communities in which we operate.

This is not to say that Plum Creek's HCP will be possible for other landowners -- of different types and sizes. Habitat conservation plans are an important tool providing the necessary flexibility to meet a variety of landownership types and patterns. Reform of the Act must incorporate incentives such as HCPs, short-form HCPs, conservation agreements and other programs to provide landowners and states and federal agencies the tools to meet different challenges. Only then will the proper role and obligations of private landowners be adequately defined and addressed under the Endangered Species Act.

We are gratified by the acknowledgment of the U.S. Fish and Wildlife Service and the National Marine Fisheries Service of our commitment that this agreement represents. Plum Creek is understandably proud of this effort, but other opportunities and solutions need to be provided.

Additional Actions By Plum Creek

Access and Land Exchange

I want to step back a bit and put the HCP in greater perspective. My earlier description of the I-90 corridor indicated the difficulties that both we and the U.S. Forest Service face in managing our respective lands. While the HCP addresses many issues under the ESA, other issues remain including recreation, aesthetics and management efficiency. A land exchange would offer an excellent opportunity to address the remaining issues facing us in this checkerboard ownership.

We have identified about 90,000 acres, much of it within the HCP area, for exchange with the U.S. Forest Service. Of this acreage, 39,000 acres of Plum Creek's land is currently unaccessed land which have been prioritized through discussions with many public groups over the past two years. We have begun discussions with the

Forest Service to reduce the original 90,000 acres to approximately 39,000 -- targeting those areas considered a high priority for public ownership. At the signing of our HCP, Secretary Glickman announced the commitment of the U.S. Forest Service to complete such an exchange in the I-90 corridor within two years. As an extra incentive to speed up the process, we have committed to defer harvest in at least 80% of the currently unaccessed area for two years, provided that the HCP remains in effect and that the U.S. Forest Service continues to process our access requests in the interim, and makes satisfactory progress toward an exchange.

This committee has been a voice for reform in many resource management areas and I would like to suggest that one of the most positive steps that you could take would be to streamline the land exchange process to accommodate "win-win" proposals such as this one, whether through the ESA or a separate bill. Over the past several months, Plum Creek has worked with Congressman Hansen on H.R. 2466, a bill designed to facilitate the burdensome and time consuming land exchange process. In addition, we have been encouraged that land exchanges have been made part of major the ESA bills, including your proposal co-sponsored by Congressman Pombo.

Plum Creek is no stranger to exchanges. We have participated in over 400,000 acres of exchanges in the Northwest which have led to the establishment of some of the country's finest wilderness and recreation areas. But, the land exchange process has become so burdensome that a 10 year duration is now routine. The prospect of such a lengthy delay in the I-90 exchange proposal is not acceptable to Plum Creek. We have communicated to all stakeholders that we must begin harvesting in these areas should an exchange not be accomplished in a timely manner.

Mr. Chairman, this committee can help public/private resource partnerships in many ways, but two specific suggestions will conclude my remarks today:

1. Encourage federal agencies to continue the prelisting and "No Surprises" policies and streamline the HCP process to reduce costs and duplicative requirements. The best encouragement would be to explicitly provide for these mechanisms in the ESA.
2. Enact H.R. 2466. A strong bill is necessary to remove the barriers and duplicative processes that have so burdened the process. Then the agencies will have the support and direction they need. We stand ready to assist your committee in any way possible to make land exchanges a more viable business consideration.

Plum Creek is proud of our HCP, conservation agreements, and land exchanges to protect public resources and promote regulatory predictability. Although these processes are not perfect, they solve problems and deserve a chance to prove their worth. They represent both substantive conservation measures and sound business decisions.

Outline of Testimony
of
William R. Brown
Plum Creek Timber Company
July 24, 1996

Mr. William R. Brown
Vice President of Resource Management
Plum Creek Timber Company
999 Third Avenue, Suite 2300
Seattle, Washington 98104
(206) 467-3638

Accompanied by:
Dr. Lorin Hicks
Director,
Fish and Wildlife Resources
Plum Creek Timber Company
(206) 467-3629

Outline

- I. **Introduction**
- II. **Background** -- This section includes a description of Plum Creek ownership and the Habitat Conservation Plan Area, which is dominated by a "checkerboard" ownership pattern.
- III. **Regulatory Framework** -- This section discusses the regulatory backdrop for spotted owls against which Plum Creek decided on an HCP.
- IV. **Description of the HCP** -- This section provides the Committee with a description of the objectives and management strategies of the Habitat Conservation Plan. It includes a brief characterization of key management strategies for: Northern Spotted Owls; Marbled Murrelets; Grizzly Bears; Grey Wolves; Lifeform Support; and, Riparian Management
- V. **Why Did Plum Creek Decide On An HCP** -- This section discusses factors that led Plum Creek to decide on an HCP. It discusses costs and benefits of the Plan to Plum Creek and the public. In addition, the section addresses key incentives in the Plan, including the "No Surprises" policy and pre-listing agreements for non-listed species.
- VI. **Additional Actions by Plum Creek** -- This section discusses the importance of a Land Exchange of approximately 39,000 acres to address remaining issues raised by Plum Creek's checkerboard ownership in the Planning Area.
- VII. **Recommendations** -- The testimony recommends streamlining the HCP process, codifying prelisting agreements such as those incorporated in the Plan and the "No Surprises" policy and enacting land exchange facilitation legislation.

Attachment 1

U.S. Fish and Wildlife Service
National Marine Fisheries Service
Plum Creek Timber Company, L.P.

PLUM CREEK HCP

June 17, 1996

I. BACKGROUND

Plum Creek Timber Company, L.P., the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service have completed a Habitat Conservation Plan (HCP) covering 418,000 acres, including 170,000 acres of Plum Creek ownership, in a portion of Washington's central Cascades commonly referred to as the Interstate 90 (I-90) Corridor (Figure 1). The ownership pattern of the Plum Creek lands covered by the HCP is "checkerboard" in nature -- intermingling private and public ownership.

Interspersed throughout the I-90 Corridor is one of the state's most dense spotted owl populations. Goshawks, bull trout and salmon are common to the area, while grizzly bears, wolves and marbled murrelets likely occur, or will in the foreseeable future. To conserve these species, and benefit many others, Plum Creek has embarked on a unique effort to protect and manage the entire ecosystem. The result is the HCP.

Under the Plan, Plum Creek will commit to a strict yet flexible 50-year ecosystem management strategy that will protect over 418,000 acres involving 20 watersheds and address the needs of 4 listed species and 281 other vertebrate species of fish and wildlife using a habitat-based landscape approach. The focus within the planning area will be on diverse forests and healthy riparian/aquatic systems.

The Plum Creek HCP is designed to complement the Northwest Forest Plan. The HCP contains provisions that will maintain all ages of forest across the landscape. Old growth levels will be maintained at current or existing levels. It will provide late successional habitat, as well as younger habitats. Emphasis has been placed on riparian buffers and on special habitats such as wetlands, talus and caves. In fact, the agreement ensures all species, listed and unlisted, will find adequate habitat within the Planning Area.

Plum Creek has used "leading edge science" to model and visualize forest structure and characteristics into the next century. Through high-resolution Geographic Information Systems mapping and radio telemetry, it can analyze, document and display complex data on wildlife population and migration patterns. Using this science and watershed analysis and the monitoring built into the Plan, the HCP provides further refinement of the "adaptive management" concept. A number of components of the HCP have been identified for adaptive management which will incorporate the results of monitoring and new information throughout the life of the HCP.

While the Plan provides more certainty for species and their habitat, Plum Creek will also benefit from the HCP. The Plan incorporates Administration policy providing long-term assurances for private land owners through the "No Surprises" and Safe Harbor Policies. Plum Creek will benefit from the ability to make long-range timber management plans without facing the uncertainties of species-by-species regulations -- greatly reducing the threat of an endangered species affecting their timber operations.

In addition to the HCP, Plum Creek and the U.S. Forest Service have agreed to undertake a major land exchange in the Planning Area, which would transfer to Federal ownership about 40,000 acres of Plum Creek lands. Plum Creek has committed to defer operations in at least 80% of these lands for two years providing successful implementation of the HCP and suitable progress being made on the land exchange and the granting of permits across Federal lands for access to unaccessed Plum Creek lands. Transfer of Plum Creek lands to the federal government will resolve the complexities of checkerboard ownership in this area for both parties.

II. LANDSCAPE/ECOSYSTEM APPROACH

A. Old Growth

With the implementation of the HCP, Old Growth will be maintained at or near current levels, about 2,000-2,500 acres. There are no existing protections for old growth without the HCP (Figure 2).

B. Riparian Buffers

Buffers in the HCP are 200 feet wide for fishbearing streams and 100 feet wide for most other perennial streams. Without the HCP, buffers on fishbearing streams could be as small as 25 feet, and nonexistent on other perennial streams. The HCP buffers provide far better continuity with the buffers on Federal lands than would occur without the HCP (Figure 3 and 4). HCP buffers may be thinned, but would continue to function as owl habitat and will contain increasing amounts of Old Growth and other Mature Forest. In addition, the HCP will also include a 30-foot, no-harvest zone along fishbearing streams, and will restrict the access of ground-based equipment (e.g., bulldozers and tractors) near perennial streams and wetlands (Figure 5).

C. Wetland Protection

Under the HCP, protection of wetlands exceeds state and federal regulations. As an example, under current regulations, a 5-acre eastside wetland with no open water would receive an average buffer of 50 feet. With the Plum Creek HCP, the buffer would average 200 feet and larger trees would provide better protection of the wetland. The HCP would also leave larger trees adjacent to wetlands than under current practices (Figure 6). For example, the size of trees remaining after harvest would be as large as before harvest. In addition, only one harvest per every 50 years would be allowed providing time for some trees to become snags

and downed logs. Forested wetlands could be harvested without restrictions today, but the HCP will require them to remain in a forested condition.

D. Watershed Analysis

Watershed analysis is presently a voluntary process which scientifically examines conditions within watersheds and makes site-specific recommendations. Within the HCP area, Plum Creek has committed to completing analyses within 5 years for 20 of the 23 watersheds in the Plan area (Figure 7). In the interim, specific measures contained in the HCP will be implemented. These specify the size of buffers, limit the amount of harvest, and address a host of other factors. When Watershed Analysis is completed, it will add conservation measures for fish and wildlife habitat, and will not remove or replace any of the protective measures specified in the HCP.

E. Spotted Owls

As the highest public profile of the endangered species in the northwest, the habitat for the Northern Spotted Owl is a major focus of the HCP over the 50 year span of the HCP. There will be a slight reduction in the number of owls (Figure 8). There are now 87 nesting pairs in the HCP area. The plan projects that to go to about 80. The HCP will not only maintain nesting, roosting, and foraging habitat but will provide habitat for dispersal as well. Dispersal habitat is not required to be retained under current regulations. Scientific projections indicate that, with implementation of the Northwest Forest Plan on federal lands and the HCP on Plum Creek property, habitat for the spotted owl will increase 27% over the next 50 years (Figure 9).

F. Conflicts Among Species

A major strength of the HCP's ecosystem approach is the ability to plan for all species rather than managing for one endangered species at the expense of others. For instance, the reduction in owl numbers is offset by additional stream protection and habitat provisions for other species which may prevent further listings.

There are inherent conflicts between certain species and groups of species such as elk and grizzly bears which forage in younger stands and openings and spotted owls which require older forests with snags and logs. Another example using riparian based species might include the needs of salamanders for downed logs and dense moist forests and certain warblers that use openings in riparian areas. Because managing for one species may impact another, an ecosystem approach is by far the most scientifically accepted practice. The goal is to manage in a way that emulates the natural amounts and distributions of habitat within which the various species have thrived.

III. SCIENCE

A. Adaptive Management

The HCP has been designed as a "living document". New information will be available in the future, but both Plum Creek and the Services desire as much certainty as possible. The mechanism to achieve these goals is the application of adaptive management. The key ingredient is the ability to improve the conservation effort if needed without conflicting with the overall goals of the HCP or the provisions of the "No Surprises" Policy.

For instance, aquatic monitoring and watershed analysis may indicate that the HCP buffers are not providing enough shade to maintain low water temperatures. In that case, buffer treatments would be adjusted to provide more shade (Figure 10). Another example would be if the observed number of owl sites found during monitoring was less than 80 percent of that projected by the models. In that case, additional deferrals could be put in place or existing deferrals extended. The intent of the adaptive management strategy is to provide the ability to incorporate new information that enhances the effectiveness of habitat protection.

B. Compliance Monitoring

The research and monitoring program designed to support Plum Creek's HCP will provide data essential for adaptive management and useful information for landscape planning. HCP monitoring and research will be funded entirely by Plum Creek, without obligating federal funds. However, as with all HCPs, the Services will conduct compliance monitoring and "spot checks" to ensure strict compliance.

IV. FEDERAL NORTHWEST FOREST PLAN

The Plum Creek HCP is designed to complement the Northwest Forest Plan (NWFP). As an additional safeguard, projections of harvest rates on federal lands within the HCP area were calculated to be higher than the NWFP projects, so that future increases would not adversely affect the goals of the HCP. Additionally, Plum Creek will maintain spotted owl habitat and older forests in the same areas as the Forest Service. By incorporating many of the ecological objectives of the Forest Plan, Plum Creek's HCP not only augments the Plan but helps ensure its success.

V. SAFE HARBOR

Voluntary Contributions of Additional Habitat

The HCP provides an incentive for Plum Creek to contribute additional habitat beyond the first 50 years of the plan for those species in most need. This concept is commonly referred to as "Safe Harbor". Without such a provision, the incentives for a landowner would be to "zero out" his habitat obligation at the end of the incidental take permit,

providing no more than was expected of him. Under the "safe harbor" concept, so long as Plum Creek's HCP performs better than predicted and more habitat is provided for species like the spotted owl, Plum Creek's incidental take would continue for up to 50 years more than is permitted under the HCP (the baseline). Plum Creek and the Services will address the biological basis for the baselines of the "safe harbor" extension at year 40.

VI. "NO SURPRISES" POLICY

The Secretaries of the Interior and Commerce have adopted a policy ensuring HCP applicants that additional mitigation in terms of money or additional lands will not be required if the applicant is meeting its commitments as outlined in the HCP. That policy does not conflict with the Services' ability to take necessary compliance actions during the life of the HCP. The cooperative spirit of the HCP, adaptive management and the incentive of "safe harbor" provide the fundamental basis for change to the Plum Creek HCP if deemed desirable or necessary by the Services. But the Implementation Agreement (IA) specifies the following procedures to effect change (presented in hierarchical order of urgency):

- Request Plum Creek to avail itself of the HCP flexibility
- Utilize, where applicable, the provisions for consultation with the Services
- Utilize, where applicable, the adaptive management provisions
- Propose either minor or major amendments
- Request redistribution of conservation as a result of unforeseen circumstances
- Require redistribution of conservation mitigation as a result of extraordinary circumstances
- Terminate permit, if needed, to avoid jeopardy

VII. FUTURE ACTION

NWFP Stability and the Proposed Section 4(d) Special Rule for Spotted Owls

It is the Administration's policy that conservation efforts should occur on Federal lands. Private lands, however, have a role as reflected in the proposed 4(d) rule and in the numerous HCPs, either already completed or in progress. Plum Creek's HCP is within the boundaries of the I-90 Special Emphasis Area (SEA) in the proposed 4(d) rule. The HCP improves on the "safe harbor" circles and surveys which would be required under the 4(d) rule by authorizing a moderate level of "take" in exchange for substantive mitigation and attention to many other species in the SEA. If the NWFP were to be eliminated and replaced with aggressive harvest and economic extraction on Federal lands, the IA provides that Plum Creek HCP lands would not be asked to compensate. However, the Services would review the situation to determine whether unforeseen or extraordinary circumstances exist as defined in the HCP contract. It is not likely that extraordinary circumstances would exist on the HCP lands without first finding that the actions on Federal lands were causing "jeopardy" to the involved species. Thus, it would be the Federal strategy which would be adjusted first. Regardless of the reasons for change in

the landscape, the existence of the HCP provides a framework for discussions that is not available today.

VIII. REPORTING INTERVALS

The Services will receive reports from Plum Creek on a regular basis. Formal reports will be submitted in years 2, 5, 10, 15, 20 and every 10 years thereafter. Meetings and discussions are expected to occur much more frequently than that on a variety of topics, as a part of the adaptive management process. Either party may request a meeting. It is expected that the nature of this HCP will afford the opportunity to reach a new level of cooperation and partnership which will enhance the effectiveness of the Endangered Species Act.

IX. LAND EXCHANGE

The HCP accommodates the potential for a land exchange. Any transfer of Plum Creek land to the federal government in the HCP area could make habitat conditions even better in some cases. Land exchanges must maintain the integrity of the HCP and conservation on the landscape. Because Plum Creek would continue responsible levels of harvesting and does not own its mills in this area, there would only be positive or neutral impacts to small mill owners and the local timber supply.

Land exchanges are important and desirable, especially in this very sensitive checkerboard landscape. Unfortunately, exchanges are often lengthy, time-consuming processes. Therefore, it is important to have a mechanism by which options may be maintained in the meantime. This makes Plum Creek's offer of voluntary two-year deferrals in areas pending land exchange all the more meaningful. Areas of potential exchange in which these voluntary deferrals would occur are being identified with full consideration of the requirements of the wildlife species present and the need for connectivity between the North and South Cascade Mountains. These voluntary deferrals are an important first step in developing strong public support for the exchange. The greatest benefit of the exchange would be to create an ownership pattern that will enhance wildlife and recreation in this important landscape.



ADAPTIVE MANAGEMENT

June 13, 1996
Plum Creek Briefing Paper

ADAPTIVE MANAGEMENT AND ITS ROLE IN PLUM CREEK'S HABITAT CONSERVATION PLAN

The concept of Adaptive Management. One of the difficulties in designing a long-term ecosystem based habitat management plan is that natural systems are dynamic and our scientific knowledge and modeling capability are inherently limited. There will thus always be risk and uncertainty -- even when the best scientific knowledge is used -- at the commencement of any long term management plan. This uncertainty is appropriately addressed through the ongoing use of "adaptive management."

Adaptive management approaches use experiments to test clearly formulated hypotheses about the behavior of an ecosystem being changed by human use. Adaptive management, therefore, is the process whereby management practices can be incrementally improved by implementing plans in ways that maximize opportunities to learn from experience.

Adaptive Management as Applied in Plum Creek's HCP. This concept of adaptive management is an important feature of Plum Creek's HCP. No other HCP to date has included such a creative, innovative adaptive management concept.

The concept is implemented in the HCP through a broad program of monitoring, surveys, reporting and cooperative research which will evaluate the biological relationships and habitat responses to management actions taken in the HCP. This process will provide the Services and Plum Creek a credible way to assess whether the HCP is functioning as intended and produce better ecological knowledge. Based on this information, the parties can develop appropriate modifications to the HCP to ensure that the plan continues to meet its objectives.

The primary challenge when using an adaptive management approach is to demonstrate simply and clearly with sound scientific information why a change in management would be warranted. Our biologists feel that the adaptive approach taken by the HCP will be able to provide that kind of sound information. In fact, many of the adaptive management ideas and approaches used in Plum Creek's HCP were offered by USFWS staff, as well as biologists from the US Forest Service and Washington Dept. of Fish and Wildlife.

The key components of Plum Creek's HCP (spotted owl strategy, life form guilding, and riparian strategy) will be tested through the adaptive management process. In general, the process will focus on whether specific HCP biological objectives are being met within the HCP planning area rather than on conditions created by external sources. This process is ongoing throughout the life of the plan as displayed in the attached Table 31 from the HCP which contains a schedule of the reporting and monitoring specifics in the plan.

The spotted owl strategy will be tested through annual owl monitoring in representative portions of the planning area. In addition small mammal prey studies will be conducted. The information thus obtained will allow us to better understand spotted owl population trends and develop mid-course corrections to the timing, spacing and extent of mitigation for this species. Ranges have been created for deviations in predicted versus actual values which will trigger discussions with the Services about potential corrective actions. A variance of more than 20% in predicted spotted owl carrying capacity once the Plan is implemented, for example, would trigger action. Monitoring will thus ensure that corrective action in the HCP is taken before long term habitat damage has occurred.

Even more fundamentally, the life form "guilding" and correlation to different habitat types underlying the multi-species element of the HCP will be tested through annual monitoring and the planned breeding bird surveys. Since most of the 16 different guilds (groupings of species that rely on similar habitat/timber types) identified in the HCP contain bird species being surveyed, we should be able to field verify the modeling assumptions used in the HCP. If discrepancies are discovered, discussions with the Services would ensue and further research and change in the plan, if appropriate, would result.

In addition to the two elements of the HCP noted above, Plum Creek's plan focusses on mitigation and protection in riparian areas. Accordingly, the HCP provides three adaptive management processes to assess success in this area: aquatic resources monitoring, watershed analysis, and a riparian management strategy

Under the aquatic monitoring strategy, we will monitor habitat conditions, the biological integrity of streams, and stream temperatures. Moreover, we will assess fish populations in a representative stream. This will enable us to test if the riparian buffer strategy is working and will provide information for the watershed analysis process described below.

Watershed analysis will be conducted on all 20 of the watersheds in the HCP area. Under this process, teams of scientists from industry, government, environmental

groups and the tribes analyze watershed conditions, prescribe management restrictions to avoid problems, and monitor results. Monitoring results are then used to update the assessments and prescriptions. Analyses are redone at regular intervals under the plan, thereby keeping them up to date over the long term.

The third adaptive management strategy focussed on riparian areas will test whether riparian area protections under the HCP provide the expected functioning habitat for various wildlife guilds. Amphibian sampling and surveys will be conducted to help us learn more about the needs of these guilds.

Lastly, the HCP identifies a number of research questions, both at the stand scale and the landscape scale, that would lead to further testing of the assumptions and modeling used in the HCP. Although not dependent on federal funding, the HCP adaptive management program fits well with the Northwest Forest Plan, in that it encourages the development of "cooperative experimental areas" within the HCP / federal Northwest Forest Plan landscape to coordinate research and monitoring efforts which support both the HCP and the Snoqualmie Pass Adaptive Management Area. Plum Creek intends to conduct cooperative research with the US Forest Service in large blocks of intermingled ownership to evaluate current spotted owl use and to conduct other management experiments. Completion of research plans is pending the finalization of the Forest Service's Adaptive Management Plan.

The adaptive management process described in Plum Creek's HCP sets a framework for continued acquisition of data and plan modification, based on credible science and documented need. It establishes limits and thresholds which initiate discussions between Plum Creek and the Services to determine what Plan modifications are appropriate to ensure compliance with HCP objectives. The recognized need for landscape-level data to support both the Plum Creek HCP and the Forest Service Snoqualmie Pass Adaptive Management Area Plan sets the stage for cooperative research in jointly designated "experimental areas".

Through the adaptive management processes summarized above, Plum Creek's HCP is designed to address biological uncertainty and change in the environment that may occur over time. Appropriate "mid-course corrections" will be taken by Plum Creek to produce desired outcomes. Changes in management and mitigation will be determined by data and guided by research results. Feedback "loops" to evaluate the necessity for modifications are synchronized with the 5- and 10-year HCP review periods.

The Relationship of Adaptive Management to the "No-Surprises" Policy. To ensure that the adaptive management strategy outlined above together with other mitigation elements of the HCP are put into place, the Services and Plum Creek have

entered into an implementation agreement (IA). The IA also provides the legal mechanism whereby Plum Creek achieves regulatory certainty through the "No-Surprises" policy. Under this policy, the Services have committed that they will not impose additional mitigation requirements on HCP applicants like Plum Creek, absent extraordinary circumstances. While this policy thus protects Plum Creek from unilateral changes that might undermine the economic basis for the HCP, Plum Creek has committed to the adaptive management process set forth above. Adaptive changes to the HCP, if necessary, are generally intended to be made on a consensual basis relying on the results of sound science. Through this process of learning from experience the HCP is designed to be flexible enough to avoid biological circumstances that would require radical changes to the plan.

It is important to note that the watershed analysis portion of the adaptive management strategy described above is not subject to the No-Surprises policy; Plum Creek has committed to implement all future prescriptions that come out of the process even if additional mitigation results. It is also important to note that the Services retain the authority to either revise management objectives or terminate the permit in the case of "jeopardy conditions".

STATEMENT OF WILLIAM J. SNAPE, III

Mr. Chairman, thank you for the opportunity to testify before your Committee this afternoon regarding habitat conservation planning and other private land initiatives under the Endangered Species Act. My name is William Snape and I am Legal Director for Defenders of Wildlife (Defenders), a non-profit conservation advocacy group consisting of 150,000 members, headquartered in Washington, D.C. with field offices in Florida, Montana, Alaska, Oregon, Arizona and New Mexico. Defenders' mission is to protect native wild animals and plants in their natural communities. Assisting me in preparing this testimony were Dr. Dennis Hosack, Defenders' conservation biologist, and Heather Weiner, Defenders' Legislative Counsel.¹

In summary, while Defenders is supportive of the concept of habitat conservation plans (HCP) under Section 10 of the Endangered Species Act (ESA), and has supported some plans in the recent past, we possess serious concerns about the direction these plans now appear to be taking. In particular, tough questions about the length of permits, scientific integrity, and monitoring requirements must be answered before most in the environmental community begin supporting these plans. Defenders recommends mechanisms be created to:

- * ensure sound science in the HCP process with a goal of species recovery;

- * secure adequate funding for HCP creation and implementation; and

- * mandate public involvement and accountability.

We look forward to working with this Committee and Congress in reaching these goals.

I. Background:

Conservation of species on private land is, by far, the biggest challenge facing Congress as it seeks to reauthorize the Endangered Species Act. It is a challenge for two fundamental reasons: 1) As evidenced by bills such as H.R.9 and S.1954, private property rights protection has become a highly charged political issue; and 2) Unlike pollution control statutes such as the Clean Air Act or Toxic Substances Control Act, which address defined industries in relatively confined geographic areas, effective species conservation law seeks to protect important

¹ Chris Williams of the World Wildlife Fund and John Kostyack of the National Wildlife Federation also provided comments on earlier drafts of this testimony.

habitat wherever it occurs.²

Wildlife cannot be protected without protecting habitat. Habitat provides shelter and food. It is essential for species to breed and perpetuate. Habitat protection, however, raises profound legal questions. Under the ESA, for example, industry took a challenge against the Fish and Wildlife Service (FWS) all the way to the U.S. Supreme Court in an effort to limit the federal government's ability to protect habitat for threatened and endangered species.³ Despite the lack of any real empirical evidence that species habitat protection negatively affects private property rights, and with some evidence to the contrary,⁴ perception appears to have become reality in some quarters. The Clinton administration's several policies with regard to private land conservation under the ESA should be understood in this political and legal context.

II. Defenders' Involvement in Private Land Conservation:

Defenders of Wildlife has been a strong supporter of the Endangered Species Act since 1966 when the first federal law was passed, and also of effective private land conservation of imperilled species for over a decade. Our novel program to compensate livestock owners for losses due to wolf predation helped pave the way for gray wolf reintroduction in Yellowstone National Park and central Idaho. In 1993, we published one of the very first reports on incentive options under the ESA.⁵ In 1994 and into the present, we have convened several workshops around the country to find solutions to perceived or real conflicts regarding species conservation.⁶ Defenders' Oregon Biodiversity Project is one of the few state-based initiatives that seeks to shape landscape level planning based upon sound science and citizen cooperation. In July 1995, we published our fourth report on the ESA in anticipation of reauthorization,

² See, e.g., General Accounting Office, ESA: Information on Species Protection on Nonfederal Lands (December 1994).

³ Sweet Home v. Babbitt, 115 S.Ct. 2407 (1995).

⁴ See, e.g., Stephen Meyer, Endangered Species Listing and State Economic Incentives (MIT, 1995).

⁵ Hank Fischer and Wendy Hudson, Building Economic Incentives Into the Endangered Species Act (Defenders of Wildlife, 1993).

⁶ Our targeted states have included California, Louisiana, Montana, Arizona, Indiana, Florida and Maine.

where we stated that we wanted to improve the habitat conservation planning process for both species and landowners.⁷ In December 1995, we published a report on endangered ecosystems and stressed the importance of private land conservation.⁸

III. Background on HCPs:

In the 1982 amendments to the ESA, Congress provided for the development of habitat conservation plans under Section 10(a) of the Act to decrease tension between economic development and species protection.⁹ HCPs serve as a release valve, allowing some areas of known habitat for listed species to be developed, with concomitant incidental take of a few individuals, in exchange for the creation and implementation of a plan promoting the conservation of the same species in the remainder of the area, or in additional areas. All non-federal lands, including state lands, are eligible for a 10(a) permit.

Section 10(a) requires that an HCP applicant "minimize and mitigate" the impacts of any taking authorized by an HCP. In addition, the HCP must not "appreciably reduce the likelihood of the survival and recovery of the species in the wild." FWS is also required by Section 7 of the ESA to ensure that approval of the HCP will not "jeopardize the continued existence" of any federally listed species. While the law does not explicitly require that an HCP positively contribute to the recovery of listed species, recovery is a significant measurement of whether an activity "jeopardizes" a species. Department of Interior guidelines specifically state that an HCP should not preclude recovery.¹⁰

Since 1993, the Clinton administration has addressed an unprecedented number of HCPs, more than the Bush and Reagan

⁷ William Snape and Robert Ferris, Saving America's Wildlife: Renewing the ESA (Defenders of Wildlife, 1995).

⁸ Reed Noss and Robert Peters, Endangered Ecosystems: A Status Report on America's Vanishing Habitat and Wildlife (Defenders of Wildlife, 1995).

⁹ See generally Michael Bean, S. Fitzgerald and M. O'Connell, Reconciling Conflicts Under the Endangered Species Act: The Habitat Conservation Planning Experience (World Wildlife Fund, 1991).

¹⁰ See DOI and FWS, Preliminary Draft Handbook for Habitat Conservation Planning and Incidental Take Permit Processing (September 15, 1994) at 30.

administrations combined. The Administration has, in particular, attempted to draft and implement multi-species HCPs in order to prevent often costly and inefficient species-by-species regulation. But, at present, multi-species HCPs often place too much emphasis on one species, relying heavily on an ecological trickledown theory. Other listed species, particularly plants, frequently have special management needs unrelated to the survival of an indicator species.

This risk escalates when the so-called "No Surprises Policy" is implemented. In August 1994 the Departments of the Interior and Commerce announced the no surprises policy, intended to assure HCP participants that the federal government will not require the commitment of additional land or financial resources beyond the level of mitigation that is determined to be adequate for the stated species under the terms of the originally approved HCP. If additional measures are determined to be necessary in the area, such as to respond to the listing of new species, the primary obligation for these measures will rest with the public through the federal government. The HCP permittees will have the responsibility for additional mitigation only under "extraordinary circumstances," which itself is ill-defined under the policy.

Another experimental HCP policy, called "Safe Harbors," originated in the southeastern U.S. with red-cockaded woodpecker HCPs. This policy guarantees the landowner freedom from any future restrictions on land use that might result if a listed species moves onto land not currently occupied by that species. While this policy has seen moderate success with single-species plans in the southeast, it should not be applied wholesale to all other landowner agreements. Biologists, including those from the federal government, warn that we could see a net loss in habitat as animals migrate from one area to another (the so-called "biological sink" phenomenon).

IV. Problems With the Administration's New Policies:

The most overarching problem with the Administration's new HCP policies are their overreliance upon "regulatory certainty." This is not at all to disparage the notion of regulatory certainty or to downplay its importance. But if this nation is to keep its commitment "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved,"¹¹ then "regulatory certainty" must be tempered by honest scientific assessments of species' trends and needs. Many who work in the natural resource sector call such assessments

¹¹ ESA, §2(b).

"adaptive management." Loosely speaking, adaptive management is the process whereby all affected stakeholders adjust ongoing human activities to address evolving conservation needs. It is crucial to note that scientifically credible adaptive management relies on constant monitoring and research of existing strategies in order to gauge their effectiveness. New information or circumstances can reveal flaws in the noblest conservation objectives, leading to species decline or extinction if unaddressed.

We also possess grave concerns about the Administration's Proposed Rule Exempting Certain Small Landowners and Low-Impact Activities From ESA Requirements for Threatened Species.¹² Of all the exemptions contemplated by the proposed rule, we are most sympathetic to the status of small residential landowners. Indeed, it is our belief that small residential landowners do not presently have any problems with the ESA. Indeed, the FWS is making great progress in simplifying and streamlining "low effect" HCPs. However, widespread exemptions from the ESA raise profound legal and policy problems. For example, what standards will govern "negligible adverse effects upon species"? Almost every scientist we have spoken with is extremely concerned that the federal government will have no ability to prevent cumulative negative impacts upon species as exemptions pile up.

V. HCP Case Study Example:

Secretary Babbitt and his staff are preparing and finalizing large-scale multi-species HCPs at a dizzying rate in the Pacific Northwest, California, Texas, and other areas around the country. No one has analyzed all of these plans because FWS does not have a central database for the hundreds of HCPs now in effect or being considered. However, it is instructive to examine at least one of the most recently approved HCPs in order to examine real life impacts of the Administration's new policies.

Thus, as an example, I will discuss the incidental take permit granted to Plum Creek Timber Company on June 27 of this year. Although we appreciate the effort of Plum Creek in developing this HCP in the central Cascades of Washington state, there exist several significant deficiencies with the plan, which Defenders noted to the FWS (and Plum Creek) in comments to both the Draft Environmental Impact Statement (DEIS) and Final Environmental Impact Statement (FEIS). The Plum Creek HCP is considered by many to be the prototype multi-species HCP. Because the DEIS and FEIS together constitute about 2000 pages of material, I will summarize our concerns:

¹² 60 Fed. Reg. 37419 (July 20, 1995).

1. Temporal Scale:

Plum Creek has received a 50-year permit under §10(a), which Defenders believes makes adaptive management for wildlife extremely difficult, if not impossible. For example, we do not believe that Plum Creek, the FWS or anyone else can predict the breeding and habitat for 285 vertebrate species between now and 2046. Could one imagine predicting the present breeding and habitat needs of the northern spotted owl in 1946? For this reason, Defenders strongly believes that permits should be of more limited duration (e.g., 10 years).

2. Definitional Questions:

Throughout the plan, terms such as "forest health," "watershed health," and "suitable vegetative cover" are used in ways that are either ambiguous or of great contention. For example, it appears the plan advocates a definition for forest health based solely on short-term timber production and not long-term ecosystem sustainability.¹³

3. Habitat Assumptions:

There are a number of highly optimistic assumptions about habitat quality and wildlife populations in the plan, which impact the treatment of roadless areas, wildlife corridors, riparian areas, and reserves. There exists no documentation to support the claim that grizzly bears will not be adversely affected by the plan. For the gray wolf, the plan suggests restricting seasonal operations within 0.25 miles of an active den site without reference to scientific data to support this provision. The plan assumes, without scientific back-up, that goshawks will move from harvest areas with no harm to population viability. The plan says that Plum Creek has taken protective measures for the Townsend's big-eared bat and then cites Plum Creek's own technical report, which is not peer reviewed. The plan assumes that protections for the spotted owl will be sufficient for the fisher, a declining inner-forest species. The plan assumes a decrease of harvesting on federal lands, which is not at all certain. The plan does not explain how this HCP relates to other HCPs and federal land management plans. The plan admits that habitat for the little willow flycatcher will be harmed, but offers no cognizable mitigation. The list unfortunately goes on.

¹³ See p.332, Plum Creek DEIS; Robert Peters, Evan Frost and Felice Pace, Managing for Forest Ecosystem Health: A Reassessment of the "Forest Health Crisis" (Defenders of Wildlife, 1996).

4. Monitoring Requirements:

We do not agree with the dichotomy that the plan establishes between monitoring and research.¹⁴ In our view, good research involves establishing a hypothesis, collecting and analyzing data, and testing the original hypothesis, a.k.a, "monitoring." In other words, monitoring and research are flip sides of the same coin. Unfortunately, the plan's approach only underscores our concern that the plan lacks concrete and binding steps to monitor compliance. The burden should be on the profiteer, not the public, to demonstrate that a public resource is not being damaged.

5. Peer Review:

All of the many technical questions already raised should be answered by an independent panel of scientists, if indeed our national goal is still to conserve species and habitats. We do not believe the Plum Creek plan, for all its efforts, would pass scrutiny under such a process. It is ironic at best that the federal government must peer review any decision to prove "extraordinary circumstances," but that peer review is not required for the overall conservation plan at issue. In addition, the vast majority of the scientific literature in the plan (supporting many of its assumptions) has not been peer reviewed itself.

VI. Solutions:

There exists no one silver bullet solution to the challenges posed by private land conservation. Many of the problems I have already identified -- scientifically unrealistic permit durations, unjustified legal burdens, lack of peer-reviewed standards -- must be addressed by either Congress or the Administration. Still, the environmental community and some industry representatives have begun to articulate several prominent themes that hold the potential answers to these questions:

1. Sound Science:

Conservation agreements with non-federal landowners must meet rigorous conservation standards and be based on sound science.¹⁵ Conservation plans that include "no surprises"

¹⁴ Plum Creek DEIS, p.387.

¹⁵ See generally National Research Council, Science and the Endangered Species Act (1995).

assurances must include measurable objectives for achieving conservation goals, timetables for achieving those goals, mechanisms to ensure sound monitoring, and plans for adaptive management to respond to changing conditions. We urge that legislative language authorizing an assurances policy include clear direction for the Secretary to alter plans if he concludes it is necessary for species recovery. For such legislative language to be effective, it must be coupled with the adoption of a dedicated funding mechanism.

2. Secure Source of Funding:

This Congress will succeed in updating and improving the federal HCP program, as well as private land conservation overall, only if it directly confronts the longstanding problem of inadequate funding.¹⁶ The FY97 budget for the Department of the Interior's HCP program was cut by the House Appropriators 25%. Inadequate funding not only obstructs sound science and species conservation, it also hurts HCP applicants by further delaying the permit process.

At the very least, Congress should fund the ESA at levels currently being provided for fish and game species under the Pittman-Robertson and Dingell-Johnson Acts, which raise roughly \$350 million annually. A dedicated funding source for the ESA is essential. Appropriate revenue sources include a real estate transfer tax, establishment of an escrow account system, dedicated portions of the mortgage interest deduction, and a tax on outdoor products under the wildlife diversity initiative. In addition, the Land and Water Conservation Fund should be fully utilized to create protected areas for endangered, threatened, and other imperiled species.

Funding measures could also be targeted, among other things, toward giving other incentives for landowners to conserve imperiled species. The federal tax code should be modified to reward landowners who take affirmative steps to restore or enhance habitat of listed species, thereby contributing to species recovery. The federal government should establish a revolving loan fund for conservation plans sponsored by state and local governments that assist in the recovery of listed species.

In addition, funding should be targeted to ensure that small landowners have a simple and inexpensive method of complying with the ESA, while avoiding cumulative impacts that might harm

¹⁶ See, e.g., Final Report of the National Wildlife Conservation/Economic Development Dialogue (Growth Management Institute/Environmental Law Institute, 1995); Lindell Marsh, Conservation Planning Under the ESA: A New Paradigm for Conserving Biological Diversity, 8 Tulane Env'l L.J. 97 (1994).

species. A technical assistance program should be established to ensure that small landowners possess adequate information. If implemented carefully, "short-form" permit applications and federal grants would further ensure that the interests of small landowners engaging in activities with negligible biological impacts are appropriately reconciled with the needs of listed species, so long as there exist monitoring mechanisms to ensure that such permits do not reduce the likelihood of species recovery.

3. Recovery:

HCPs should not in any way diminish the present goal of species recovery under the ESA or be used as a way to replace the present recovery plan requirements. The precautionary principle¹⁷ that has been at the heart of the ESA since its inception, as well as established recovery goals¹⁸, should guide the initiation of conservation agreements with non-federal landowners that also seek to provide such landowners with increased certainty. All large-scale conservation agreements should be independently peer reviewed under these standards. When a permit, pursuant to monitoring, is shown to be contrary to objective and scientific recovery goals, that permit should be either revoked or modified.

4. Public Involvement:

Public involvement in private landowner agreements is imperative to the long-term success of HCPs. As HCPs become more common, we are hearing more complaints from local citizens about exclusion from HCP deliberations. We are also seeing citizen concerns ignored during the notice and comment period. Participation in HCP review teams should be balanced and without conflicting interests, and HCPs should be periodically monitored and publicly reviewed for compliance with the terms of the incidental take permit. These small but significant efforts to increase public participation will help reduce scientific, economic, and legal obstacles in the long run.¹⁹

¹⁷ See, e.g., Ellen Hey, The Precautionary Concept in Environmental Policy and Law: Institutionalizing Caution, 4 Georgetown Int'l Env'l L.R. 303 (1992).

¹⁸ ESA, §4(f).

¹⁹ For an example of a creative approach to private land conservation that seeks to combine these elements, see Todd Olson, "Biodiversity and Private Property: Conflict or Opportunity?" in William J. Snape, III (ed.) Biodiversity and the Law (1996).

VII. Conclusion:

Defenders believe we are at a historical crossroads with regard to private land conservation. Although the public is still grappling with the specific details of many habitat conservation plans, the Clinton administration deserves credit for its attempt to forge new ground. And while Defenders adamantly rejects the regulatory approach of the Young-Pombo ESA reauthorization bill of this Congress,²⁰ many of the incentive proposals contained in companion bills deserve continued attention.²¹ I predict that the 105th Congress will reauthorize the ESA with bipartisan support for legislation that squarely addresses the private land challenge. Any legislative solution, in the final analysis, must be economically credible, scientifically supportable and publicly accountable.

²⁰ H.R.2275 104th Cong., 1st Sess. (1995).

²¹ See, e.g., H.R. 2286, 104th Cong., 1st Sess. (1995) (refunds, enhanced deductions for conservation easements, credits for compliance with endangered species agreements); H.R. 2423, 104th Cong. 1st Sess.(1995) (estate tax relief); H.R. 2374, 104th Cong., 1st Sess.(1995) (creation of cost-sharing species reserve program and cash awards for conservation). See also The Keystone Center, The Keystone Dialogue on Incentives for Private Landowners to Protect Endangered Species (July 25, 1995).

STATEMENT OF JACK LARSEN

**Statement of Jack Larsen
Vice President — Office of the Environment
Weyerhaeuser Company**

**Submitted to the Record of
the U.S. House of Representatives Committee on Resources**

July 24, 1996

Introduction

Mr. Chairman and members of the committee, Weyerhaeuser Company appreciates the opportunity to provide comments on the Habitat Conservation Planning (HCP) process to the U.S. House Resources Committee.

Before we begin our comments on the HCP process, we would like to give you an overview of our company. Weyerhaeuser is an international forest products company. Its principal businesses are growing and harvesting trees and manufacturing, distributing and selling forest products. Weyerhaeuser owns and manages approximately 5.3 million acres of timberland in the United States.

The company has been managing forestlands since 1900 and currently supports the largest private silvicultural and environmental forestry research staff in the world.

Mr. Chairman, Weyerhaeuser is committed to being part of the solution surrounding threatened and endangered species issues. We are following up on this commitment by working with federal and state agencies in cooperative efforts to protect threatened and endangered species.

Although our forests are managed for the production of wood, our goal is to protect, maintain and enhance other important environmental characteristics. This includes soil productivity, water quality, fish and wildlife habitat, and other sensitive environmental areas.

We believe private forestlands have an important role in protecting threatened and endangered species. Private lands can:

- Provide habitat for species dependent on younger forests.

- Complement federal efforts to protect species dependent on older forests by providing unique sites and various types of fish and wildlife habitat while, simultaneously, providing forest products for consumers and economic returns to their owners.

Weyerhaeuser has experience with Habitat Conservation Planning

Weyerhaeuser's HCP activity is driven by the need to find solutions for threatened and endangered species on Weyerhaeuser timberlands. Weyerhaeuser already has completed two single-species HCPs and is developing two multi-species HCPs.

Weyerhaeuser's first HCP for the northern spotted owl, second for American burying beetle

In 1995, Weyerhaeuser completed an HCP for the northern spotted owl on its 209,000-acre Millicoma Tree Farm in southwestern Oregon. This 50- to 80-year agreement with the U.S. Fish and Wildlife Service (F&WS) is designed to enhance the conservation and recovery of the owl in southwestern Oregon. The plan focuses on providing habitat for migrating juvenile adults and complements federal and state efforts to provide spotted owls habitat for nesting, roosting and foraging on adjacent lands.

In 1996, Weyerhaeuser completed an HCP for the American burying beetle in Oklahoma. This plan uses an adaptive-management approach that prescribes forest practices for the life of the permit.

Weyerhaeuser also has efforts under way to complete two multi-species HCPs: One is for 400,000 acres in the Willamette, Ore., region and one is for 110,000 acres in southwestern Washington. These plans will move beyond the traditional "species-by-species approach" to a "habitat-based approach" that recognizes the importance of providing diverse types of habitat over time.

Weyerhaeuser uses the best available scientific information and its own Habitat Management Planning process to develop these HCPs. Our planning process examines wildlife and habitat relationships in a managed forest landscape. This process, entailing over two years of extensive data collection and research, has shown us how changing our forest management practices can benefit fish and wildlife populations. This scientific process addresses habitat conditions and requirements for multiple species and identifies the appropriate management practices needed to achieve long-term benefits for all species.

Habitat Conservation Plans (HCPs) are a beneficial tool

Working with the HCP process has given us valuable insight and uncovered some fundamental truths:

- ***The importance of science-based processes*** — Weyerhaeuser’s extensive experience in research and development and forest management has resulted in improved understanding of the unique needs of species and how our lands can provide for their habitat.
- ***Each HCP will be unique*** — Geographic differences, species variability and landowner objectives differ across regions and within regions. Our experience with watershed analysis and Habitat Management Planning in the Pacific Northwest has taught us that each area is unique and different habitat types require different actions.
- ***The HCP process is a valuable tool for bringing parties together*** — The HCP process enables private landowners and the government to work together to establish mutually beneficial methods to protect habitat for threatened and endangered species and other fish and wildlife. Creating these win-win opportunities helps the government and private sector work more effectively with each other in a partnership-based relationship — rather than an adversarial-based relationship.
- ***The HCP process is one of several tools available to landowners*** — The ability to participate in several types of voluntary agreements gives landowners the opportunity to address the needs of unique and diverse types of land ownerships. For example, we have been involved in two types of voluntary agreements: a “memorandum of understanding” for the red-cockaded woodpecker and a “no-take” agreement for the spotted owl.

Improving the HCP process

We believe Weyerhaeuser, the public, and threatened and endangered species have benefited greatly from the HCP process. We say this because:

1. Weyerhaeuser has been able to manage its forestlands in an effective and environmentally sound manner.
2. Government agencies have been able to fulfill their objectives under the ESA.
3. Weyerhaeuser has demonstrated the ability to protect habitat for one of the most

important stakeholders in this equation — threatened and endangered species.

What we can do now is take advantage of the progress we've made and make the HCP process better for all landowners. The following information lists some improvements we feel would encourage landowners to develop their own HCPs.

Eliminate duplication from NEPA procedures

A serious impediment to landowner participation in the HCP process is the environmental impact statement (EIS)-related requirements of the National Environmental Protection Act (NEPA). Analyses required by NEPA duplicates the analysis required for an HCP and the associated biological opinion, and the additional documentation and review processes add significant burdens to applicants.

The National Marine Fisheries Service (NMFS) and the F&WS must comply with EIS-related requirements under NEPA before approving an HCP and issuing an incidental-take permit. This requirement adds major costs, longer time frames and additional risk to applicants. In fact, more than half of the cost and time to develop Weyerhaeuser's Coos Bay HCP was directly related to EIS requirements under NEPA.

In addition, the NEPA documentation cannot be completed until the HCP is nearly approved, but the HCP cannot be finalized until the NEPA documentation and process have been completed. This places applicants at the mercy of two processes.

Applicants are faced with uncertain outcomes, uncertain time lines for completion, uncertain costs, and a risk of legal challenge to the NEPA documentation. These uncertainties create serious disincentives for landowners to develop HCPs.

To encourage more landowner HCP participation, we ask the committee to consider exempting incidental-take permit decisions from the EIS requirements under NEPA. There is ample precedent for this in the regulatory programs administered by EPA (where virtually all permits and many other decisions are exempt from EIS-related requirements. Such an exemption is needed more for the HCP process because it's voluntary.) The HCP process should remain voluntary, but Congress can and should take steps to encourage more landowners to use it.

Other improvements

- *Clearly defining the scope of data and analysis required by applicants.* The F&WS

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and NMFS should have clear authorization to issue incidental-take permits using the best available information on the land in question and the species of concern. Landowners should not be required to conduct costly surveys and research to obtain an incidental-take permit. However, surveys and research may be appropriate measures to include in HCPs, where needed, to minimize and mitigate the take of listed species and to demonstrate that habitat-based prescriptions are achieving their intended goals.

- ***Formalizing Secretary Bruce Babbitt's "No Surprises" policy and allowing federal agencies and the landowners to make adjustments during normal periodic reviews, without reopening the process, including consultation, even if conditions change or more data become available.*** It's important that a landowner have some degree of certainty that federal agencies will not unilaterally impose additional restrictions during the life of the HCP without the landowner's consent. We believe Secretary Bruce Babbitt's "No Surprises" policy should be formalized in the ESA.
- ***Giving landowners "one-stop shopping" for HCP development and approval.*** Under the ESA, the F&WS is responsible for all terrestrial fish and wildlife. The National Marine Fisheries Service has responsibility for species of anadromous fish, i.e., salmon. In the Pacific Northwest, landowners are working to develop comprehensive management plans to address fish and wildlife concerns with two agencies, two departments, and two different staff structures. The multiple points of contact, review and decisions-making layers are making the process slow and cumbersome.
- ***Recognizing the individuality of HCPs.*** Geographic differences, species variability and landowner objectives differ across regions and within regions. What may work for one landowner may not work for another and it's important that the F&WS and NMFS continue to recognize and evaluate every HCP on its individual merits, and not on a set and standardized format.

Adopting a habitat-based approach

With 435 species currently listed in the United States as threatened or endangered and the possibility of more listings, Weyerhaeuser believes a habitat-based approach to multi-species planning and management is more beneficial to the environment, wildlife and potential applicants than the current species-by-species approach.

Planning for multiple species may help reduce the need for listing additional species as well as help provide habitat for those that are, or may become, listed as threatened or

endangered. It could provide increased regulatory certainty to landowners by instituting a means to address species not currently listed and providing incentives for landowners to undertake the HCP process.

A habitat-based approach also shifts the focus from issues generally beyond the landowner's control — like the status of a particular species — to matters on which the landowner can make a meaningful and positive contribution, such as the habitat on their land. This approach addresses habitat conditions for many wildlife species over time instead of the exhaustive species-by-species analyses.

Weyerhaeuser believes landowners should have the option of developing a habitat-based approach. Creating such an option requires a number of modifications to the existing HCP process, including:

- ***Provide a habitat-based planning process as an option to the current species-by-species approach.*** Under the current statute, the HCP must specifically address each species for which an incidental-take permit would apply. Instead, there is a need for mechanisms that develop and approve plans based on habitat characteristics.
- ***Relieve landowners with approved habitat plans from ESA concerns for newly listed and unlisted species, unless the landowner's plan is found harmful to a newly listed species.*** Under the current system the landowner has to apply for a new incidental-take permit whenever a new species is listed.

This subjects the applicant and the governmental agency involved to all EIS-related requirements of NEPA, public notice and comment requirements, interagency consultation requirements, etc., as if the existing permit had never been issued. In essence, landowners have to repeat the HCP approval process for any species that are subsequently listed even if their plans address the habitat of the newly listed species and no changes in their plans are needed.

Moreover, landowners who implement plans that enhance habitat should not have to be concerned that they could be penalized if listed species are attracted to their property or become more prevalent as a result of their plans.

Summary

Weyerhaeuser is committed to making the HCP process a workable solution. We believe the HCP process can be used to resolve private forestland issues associated with

threatened and endangered species and will continue to develop our conservation plans in cooperation with government agencies. The company views the HCP process as one that can reconcile conservation of threatened and endangered species with the productive use of private land. However, we feel it's time for the process to be improved and reflect the actual experiences of landowners.

ONE HUNDRED FOURTH CONGRESS

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U.S. House of Representatives
Committee on Resources
 Washington, DC 20515

June 28, 1996

The Honorable Bruce Babbitt
 Secretary
 U.S. Department of Interior
 1849 C Street N.W.
 Washington, D.C. 20240

Dear Secretary Babbitt:

In July, 1995, the Fish and Wildlife Service published a rule in the Federal Register proposing a special rule under Section 4(d) of the Endangered Species Act exempting certain small landowners and low impact activities from the requirements of the ESA. This rule is commonly referred to as the "Five Acre Rule".

Under the rule residential properties under 5 acres as well as certain other activities that have minimal impacts will not require a Section 10 permit for use if the property is habitat for a threatened species. Please provide the Committee on Resources with the following information:

1. The date on which this rule went into effect.
2. Any subsequent rules to apply this rule to existing threatened species populations.
3. Whether there have been any persons who have notified the Fish and Wildlife Service that they wish to take advantage of the exemption and if so the number of such persons, the county and state in which they reside, and the species to which the exemption applies.
4. Any subsequent rules or guidance documents specifying the types of activities which will be exempt under the "negligible" effects exemption.

This above information should be provided to the Committee on Resources not later than 5:00 p.m. on July 15, 1996. Please coordinate this request with Elizabeth Megginson at 225-7800.

Yours truly,


 Don Young
 Chairman

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 RANKING DEMOCRATIC MEMBER
 EDWARD J. MARREY, MASSACHUSETTS
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DANIEL VAL KISH
 CHIEF OF STAFF
 DAVID G. DYE
 CHIEF COUNSEL
 JOHN LAWRENCE
 DEMOCRATIC STAFF DIRECTOR



ADDRESS ONLY THE DIRECTOR
FISH AND WILDLIFE SERVICE

United States Department of the Interior

FISH AND WILDLIFE SERVICE
Washington, D.C. 20240

In Reply Refer To:
FWS/AES/TE

25

The Honorable Don Young
Chairman, Committee on Resources
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Thank you for your June 28, 1996, letter requesting information on the Fish and Wildlife Service's proposed small landowner exemption under section 4(d) of the Endangered Species Act. As you are aware, on July 20, 1995, the Service published in the Federal Register a proposed rule that, if made final, would exempt certain small landowners and low-impact activities from Endangered Species Act requirements for threatened species.

As you are aware, over the last three years, the Service has worked tirelessly to improve the implementation of the Act. One of our highest priorities has been to ease the regulatory burden on private landowners where possible. The proposal to exempt certain small landowners and low-impact activities from the ESA is another such initiative.

Your June 28, 1996, letter requests information in four areas regarding that proposal. First, you requested the date on which this rule went into effect. At this time there is no final rule related to this proposal, and the policy has not gone into effect. The Service is still reviewing the numerous comments received in response to the proposal. We anticipate making a final decision on the proposal this Fall.

Second, you requested information on any subsequent rules to apply this rule to existing threatened species populations. Any such applications will not occur until the proposed rule is finalized.

Third, you were interested in whether there have been any persons who have notified the Fish and Wildlife Service that they wish to take advantage of the exemption and, if so, the number of such persons, the county and state in which they reside, and the species to which the exemption applies. While the Service's Field and Regional offices may have received informal inquiries about the proposal in response to its publication, the Washington office is not aware of any specific requests.

The Honorable Don Young

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Finally, you requested information on any subsequent rules or guidance documents specifying the types of activities which will be exempt under the "negligible" effects exemption. Again, until this proposal is finalized, we will not be making these types of decisions.

Once again, thank you for your interest in this policy. We would be happy to provide you with advanced notice of any final publication of this, or related, rules or guidance, and will be pleased to brief you or the members of your staff at such a time.

With kind regards,

Sincerely,


Acting DIRECTOR


VALARIE BRISTOL

TRAVIS COUNTY COMMISSIONER—PRECINCT 3

 TRAVIS COUNTY ADMINISTRATION BUILDING
 314 W. 11TH STREET ROOM 500
 P.O. Box 1748 Austin, Texas 78767
 473-9333

August 16, 1996

 Honorable Don Young
 U.S. House of Representatives
 Chairman
 Committee on Resources
 1320 Longworth
 Washington, D.C. 20515

Dear Congressman Young:

We are writing in response to your letters, dated July 25, 1996, regarding the Balcones Canyonlands Conservation Plan and its implementation in Travis County, Texas. Please enter this response into the record of the House Committee on Resources' hearing held on July 24, 1996, concerning the implementation of the Endangered Species Act. We appreciate having the opportunity to respond.

The Balcones Canyonlands Conservation Plan was developed over the past seven years by local government, landowners, developers, environmentalists and citizens as a local response to the presence and listing of eight endangered species around Austin, Texas. Over two-thirds of the land for the preserve system has already been acquired through the City of Austin, Texas Nature Conservancy, the Lower Colorado River Authority, the Travis Audubon Society, Travis County, and \$42 million in bonds approved by the citizens of Austin. These community efforts culminated in the issuance of a regional 10(a) permit by the U.S. Fish and Wildlife Service to the City of Austin and Travis County.

Developed locally, the Balcones Plan is designed to maximize local control over natural resource issues. Because participation in the Plan is voluntary, it imposes no new regulations on the local community. It simply offers a voluntary alternative for compliance with the Endangered Species Act.

We believe that the Plan has great potential to promote and sustain the strong economic growth being experienced in our area, while setting aside 30,000 acres in our beautiful hill country that will preserve our unique natural resources for future generations. Completion and proper maintenance of the preserve system will free the entire county from Endangered Species Act requirements for species covered by the Plan. The Austin Real Estate Council and the Greater Austin Chamber of Commerce endorse the Plan because of its anticipated benefits to the local economy and the land development process.

The strategic partnership between local governmental entities under the Plan also pays dividends in expediting our infrastructure and capital improvement projects. Although we only received our regional 10(a) permit three months ago, we have already been able to facilitate a major road widening project through the Plan. In addition, the Plan will be used to expand services at a new fire station. Both projects would have been extensively delayed and would have caused added expense to taxpayers if the Plan was not in place. We anticipate using the Plan for many other public sector projects, including construction of new schools.

While the Plan took seven years to finalize, much of that time was spent testing and refining several versions with the public and other stakeholders. The Austin Field Office of the U.S. Fish and Wildlife Service has been very flexible and helpful since the Plan's inception. Throughout the development of the Plan, we found the habitat conservation plan process to be very workable, as we sought to meet local needs within the context of endangered species protection.

Participation in our Plan is strictly voluntary. For those wishing to develop outside the proposed preserve boundaries, the Plan provides a voluntary alternative to seeking an individual 10(a) permit. In many cases, participation in the Plan should be faster and more cost-effective than pursuing an individual permit, but that is a business decision which developers and landowners are free to make. To date, we have issued two certificates and are currently in negotiations with other potential participants.

Participation charges are collected only for those who choose to participate, in exchange for almost instant release from Endangered Species Act requirements for the species covered under the Plan. Because our Plan is based on a "pay-as-you-go" model, acquisition of the remaining 9,500 acres hinges on the extent to which landowners and developers voluntarily seek to participate. We intend to acquire this land as soon as possible, but recognize that future demand for new development will drive this timeframe. Funding for this land acquisition will come from voluntary, participation charges and a redirection of taxes generated by new development.

Although we were not present at your committee hearing on July 24, we understand that Mr. Tom Kam, a Travis County resident, expressed concerns about the impact of the Plan on his undeveloped, 9.5 acre tract. Landowners such as Mr. Kam, whose property is within the proposed preserve, are not eligible to participate in the Balcones Plan. However, these landowners are still able to apply for an individual 10(a) permit from the U.S. Fish and Wildlife Service, an option available to them long before the regional permit was granted.

Throughout the past seven years, Mr. Kam has had numerous opportunities to express his concerns and comments about the Plan, at open meetings of various task forces, during the comment periods of the 10(a) permit process, and at voting sessions of the Austin City Council and Travis County Commissioners Court.

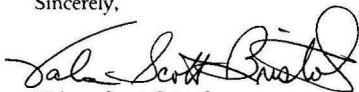
Over one year ago, Mr. Kam presented a landowner survey to a Balcones Plan task force. The survey cited an average asking price of \$28,600 per acre for those willing to sell, but the survey did not include appraised or fair market values for comparable land in the proposed preserve unit. Participation charges under the Plan are based on an average of fair market values throughout the county-wide permit area. Governmental entities are not legally allowed to pay more than fair market value when acquiring land for preserves or other purposes.

Honorable Don Young
Page 4
August 16, 1996

Throughout the county, market values for undeveloped land vary greatly, due to location and site-specific characteristics. Recent City of Austin appraisals for the purchase of property in the vicinity of Mr. Kam's 9.5 acres continue to support the \$5,500 average price used in the Balcones Plan. If land values increase in the future, the participation charges can be adjusted accordingly, over the 30-year term of our permit.

Although this Plan will not resolve every landowner concern in Travis County, we continue to believe that it represents the best compromise between many competing interests. Our preserve system is already more than two-thirds complete and we have added new acreage since the permit was issued. Because the Plan is financially viable, the Travis County Commissioners Court and the Austin City Council voted to support and approve it. We are pleased that the U.S. Fish and Wildlife Service continues to promote the habitat conservation plan process as a means for local communities to comply with the requirements of the Endangered Species Act.

Sincerely,



Valarie Scott Bristol
Travis County Commissioner
Precinct Three



Bruce Todd
Mayor
City of Austin

PALCO**THE PACIFIC LUMBER COMPANY** SCOTIA, CALIFORNIA 95565 • 707/764-2222

August 8, 1996

The Honorable Don Young
Chairman, Committee on Resources
c/o Ms. Deborah Callis
1328 Longworth House Office Building
Washington, D.C. 20515-6201

Dear Chairman Young:

The attached comments of The Pacific Lumber Company and its parent, MAXXAM Inc., are submitted in response to the Resource Committee's July 25, 1996, oversight hearing on the Endangered Species Act with regard to Section 10 (a) permits (Habitat Conservation Plan) and other incentives. I respectfully request that this letter and attached statement be included in the permanent record of that hearing.

I also want to commend you and the Resources Committee for your oversight of the Endangered Species Act and your efforts to make important improvements in the Act. Clearly the Endangered Species Act is not working either as intended by the Congress or as is necessary to protect the property rights of individuals and corporations guaranteed by the United States Constitution.

The Endangered Species Act has repeatedly, substantially and adversely impacted the 1,600 employees of Pacific Lumber, as well as our neighbors in Northern California, the local governments that depend upon the company for tax revenues, and the other businesses from which the company purchases products and services. This has occurred despite the fact that all of Pacific Lumber's harvesting activities must meet California's strict forest management rules and regulations (the most stringent in the world) and despite the fact that Pacific Lumber has won recognition from the State of California and national organizations for our use of sound management practices for our forests and for the programs we conduct to protect and enhance the species that inhabit our lands.

For years, The Pacific Lumber Company and its parent MAXXAM Inc. have been the target of an extraordinary litigation, lobbying and press campaign designed to obtain control of initially 3,000 acres and now 60,000 acres (almost a third) of our privately owned forest lands. The Endangered Species Act is the principal assault weapon used in this campaign. The regulatory

The Honorable Don Young
 August 8, 1996
 Page Two

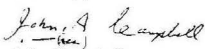
authorities and litigation opportunities authorized by the Act are so extensive and the rights granted to affected property owners are so limited, that the Act has become the weapon of preference to halt economic activity on targeted property. The preservation of a broad range of habitat for certain species is only a secondary objective of the campaign against Pacific Lumber. The primary objective is the expansion of the government's park system to include the mature redwood groves and contiguous forests we own. This objective has been repeatedly stated in Congressional hearings and floor debates, in filings in ESA regulatory and judicial proceedings, and more recently in full page advertisements in major newspapers.

Pacific Lumber and MAXXAM have repeatedly stated our willingness to transfer ownership of the approximately 3,000 acre Headwaters Grove and surrounding 1,500 to 1,700 acre buffer zone to the Federal Government or to the State of California for use as a park or wilderness area - provided we receive fair market value (the form of which we are willing to negotiate) for our properties and we receive the ESA approvals required to use the remainder of our properties for the intended purpose of timber harvesting. We continue to pursue this possible transaction in cooperation with the Federal and State of California governments.

Also, in response to years of infringement by the Federal Government on our right to use our property and in the absence of an agreement for acquisition of the Headwaters, Pacific Lumber recently has filed an inverse condemnation suit against the Federal Government to protect our Fifth Amendment right to just compensation. Although the factual background is detailed, the gravamen of our complaint is straightforward: application of the Federal Endangered Species Act, 16 U.S.C. Section 1531 et seq. has taken certain portions of Pacific Lumber's property for public use without payment of just compensation.

Regardless of the course of actions on acquisition of the Headwaters Grove and on our inverse condemnation suit, the Endangered Species Act clearly needs to be reformed. Pacific Lumber and MAXXAM support the legislation, H.R. 2275, reported by the House Resources Committee to reauthorize and improve the Endangered Species Act. We strongly urge the Congress to continue its efforts to enact truly meaningful reform of the Act. We also urge renewal of the efforts to enact legislation to assure that there is effective protection against, or prompt and full compensation for, regulatory takings of private property in accordance with the property rights protections of the United States Constitution.

Sincerely,



John Campbell
 President

THE PACIFIC LUMBER COMPANY And MAXXAM INC.
Statement for the Record of the
House Committee on Resources
Oversight hearing on the Endangered Species Act with regard to Section 10(a) permits
(Habitat Conservation Plan) and other incentives.
July 25, 1996

Founded in 1869, The Pacific Lumber Company (PALCO) is a major producer of premium-grade redwood and Douglas fir lumber. The company's forest products operations consist of five modern sawmills and related facilities in Humboldt County, California, and nearly 198,000 acres of timberland and other property. The company is a wholly owned subsidiary of MAXXAM Inc.

Pacific Lumber is the largest private employer in Humboldt County, employing approximately 1,600 people. The company's headquarters is in Scotia, where Pacific Lumber owns all the land and buildings. Scotia is a community of 272 homes (in which some of the company's employees and their families live), churches, schools, a commercial district, an historic hotel, museum, and modern medical clinic.

Pacific Lumber does not use trees harvested from government-owned land; it depends entirely on its own forests to meet its manufacturing needs. Pacific Lumber's forest lands are zoned by the State of California exclusively for commercial timber production. All of Pacific Lumber's harvesting activities must meet California's strict forest management rules and regulations, the most stringent in the world.

The Endangered Species Act has repeatedly, substantially and adversely impacted the 1,600 employees of Pacific Lumber, as well as their neighbors in Northern California, the local governments that depend upon the company for tax revenues, and the other businesses from which the company purchases products and services. This has occurred despite the fact that Pacific Lumber has won recognition from the State of California and national organizations for the company's use of sound management practices for its forests and for the programs the company conducts to protect and enhance the species that inhabit Pacific Lumber's lands.

For years, The Pacific Lumber Company and its parent MAXXAM Inc. have been the target of an extraordinary litigation, lobbying and press campaign designed to obtain control of initially 3,000 acres and now 60,000 acres (almost a third) of the company's privately owned forest lands. The companies have been a target for two primary reasons. First, unlike some timberland owners who long ago cut all their old growth trees, Pacific Lumber's conservative forest management approach has put the company in a position today of having a substantial supply of old growth redwood and Douglas fir trees. Pacific Lumber's lands contain the largest remaining privately-owned old growth redwood stands, including the 3,000 acre Headwaters Grove. Some environmental activist organizations have targeted these trees for preservation, either through public acquisition or permanent "protection" as endangered or threatened species "habitat". Second, the targeted 60,000 acres of Pacific Lumber's property is located between the Six Rivers National Forest and the Humboldt Redwoods State Park, which the environmental activists would

like to link together in an unbroken corridor of public ownership - or, failing that, a corridor void of economic activity.

The Endangered Species Act is the principal assault weapon used in this campaign. The regulatory authorities and litigation opportunities authorized by the Endangered Species Act are so extensive and the rights protected for affected property owners are so limited, that the ESA has become the weapon of preference to halt economic activity on targeted property. Environmental activists are using the ESA to systematically file court suits to obtain consecutive listings of species on Pacific Lumber's lands as "threatened" or "endangered" and then have the lands classified as protected "critical habitat". It started with the spotted owl, is now occurring with the marbled murrelet, and listing initiatives are underway on the coho salmon.

The preservation of a broad range of habitat for certain species is only a secondary objective of the campaign against Pacific Lumber. The primary objective is the expansion of the government's park system to include the mature redwood groves and contiguous forests owned by Pacific Lumber. The fall back position is to preclude economic development of Pacific Lumber's property and natural resources. These goals are not secret; they have been repeatedly stated in Congressional hearings and floor debates, in filings in ESA regulatory and judicial proceedings, and more recently in full page advertisements in major newspapers.

The Endangered Species Act is not working either as intended by the Congress or as is necessary to protect the property rights of individuals and corporations guaranteed by the United States Constitution. Pacific Lumber and its employees commend the Resources Committee for its oversight of the Endangered Species Act and the Committee members' efforts to make important improvements in the act.

The public and congressional debates on reform of the ESA should be based on factual circumstances, on science, and on the rights of persons as well as the goals of species diversification. Unfortunately, some of the opponents of reform apparently have decided that they cannot win the substantive debates. Instead, they have resorted to propaganda tactics including the dissemination of misinformation and use of inflammatory statements designed not only to divert attention from the facts but also to weaken the opposition through character association and guilt by association.

Pacific Lumber, and MAXXAM have often been the object of these propaganda tactics. To help refocus the policy debate on matters of fact, substance, and relevance, the following information about the Pacific Lumber Company's activities during the last ten years of MAXXAM's ownership is presented for the record:

Over the past several years, employment has grown from approximately 950 people to 1,600 people. Approximately \$125 million has been reinvested in operating plants, equipment, and timberlands. The company was refinanced several years ago so that more than half of its debt is now investment-grade and the remainder carries a lower cost than the original debt. The company

has constructed and operates an award winning cogeneration plant to burn wood waste to generate electric power for the mills and the town of Scotia. After the town's commercial center was destroyed by earthquake-caused fires several years ago, Pacific Lumber rebuilt it at a cost of approximately \$4 million.

Pacific Lumber annually contributes approximately \$100,000 in cash and materials to worthwhile causes in the North Coast communities in which it operates and where it is the largest employer. The churches in Scotia which use company owned facilities still pay only a dollar in rent per year. Similarly, Pacific Lumber has continued its long history of leasing hundreds of acres of its land, for a dollar a year, to such organizations as the Boy Scouts, Girl Scouts, Camp Fire Girls, and church bible camps. The company still provides attractive, affordable, company-owned rental housing for many of its employee families. Also, the company continues to provide scholarships to children of its employees. More than \$1 million of scholarships have been awarded in the last ten years.

Executive Life had been selected in 1986 as the provider of annuities to Pacific Lumber retirees, as part of a legal pension plan reversion transaction. The State of California placed Executive Life into receivership in 1991, which receivership lasted until 1995. Of the many companies that were impacted by Executive Life's conservatorship, Pacific Lumber was among a handful who immediately and voluntarily stepped forward to make up the shortfall in its retirees' pensions that otherwise would have occurred. Thus, no Pacific Lumber pensioner or annuitant has been deprived of one penny of his or her entitlement. Also, all litigation relating to the security of Pacific Lumber's retirees' annuities has been settled.

The people of Pacific Lumber take great pride in their stewardship of the land. The company's future depends on the excellence of their efforts.

The Company manages its forest resources on a sustained cycle of planting, regrowth and harvest. It maintains a harvest-to-inventory ratio that's among the lowest in the industry. It conducts harvest operations on only a very small percentage of its land in any given year - much of that activity is conducted by harvesting trees selectively, a method that generally leaves about 50% of the trees standing in a given area. Pacific Lumber plants an average of 500,000 seedlings annually to supplement the robust natural regeneration of the forest.

The Company also places high priority on waste minimization programs. A prime example is the installation of equipment to produce finger-joint lumber products. The process - in which small pieces of wood are joined and glued together to produce items such as siding, fascia, trim, molding, and paneling - makes use of a valuable resource in economically advantageous ways. The use of waste wood as fuel in the company's cogeneration plant is another example. The company has also instituted alternative disposal methods for the ash byproduct of the power plant to prolong the life of local landfills. The California Integrated Waste Management Board has honored the company for its waste management and reduction programs.

Water quality, watershed protection, and salmon protection have long been part of Pacific Lumber's operations. The company's voluntary fisheries enhancement program is exemplary, having received the National Wildlife Stewardship Award of the Forest Products Industry in 1994. Last year, the program released 50,000 Chinook salmon and steelhead trout into North Coast streams. The company's hatchery uses only eggs from fish native to local streams, thereby protecting the genetic strains. In addition, Pacific Lumber has enhanced streams through bank protection, erosion control, construction of fish ladders, and other projects to improve environmental conditions for fish and other wildlife.

Several years ago, Pacific Lumber helped to develop a protocol to protect northern spotted owls, which - contrary to early assertions by some activist groups - thrive in second- and third- growth as well as old-growth forests.

Pacific Lumber long ago approached the Fish and Wildlife Service to begin discussions of a habitat conservation plan for marbled murrelet, even though the company believes firmly that private lands should have been excluded from the critical habitat designation, as was the object of the amendment offered by Congressman Frank Riggs (R-CA) to the FY 1997 Department of Interior and Related Agencies Appropriations Act. However, the company's most recent initiative in January of 1996 received a very negative response from the Department of Interior. Interestingly, several months later - after Pacific Lumber had filed its inverse condemnation suit on May 7, and after the House of Representatives debated the Riggs private property rights initiative on June 19th - the Department of Interior contacted the company to say there had apparently been a misunderstanding. (Copies of the Pacific Lumber and Interior letters on this subject are attached to this statement.)

Pacific Lumber and MAXXAM have repeatedly stated a willingness to transfer ownership of the approximately 4,500 acre Headwaters Grove and surrounding buffer zone to the Federal Government or to the State of California for use as a park or wilderness area, provided the company receives fair market value (the form of which is negotiable) for its properties and receives the ESA approvals required to use the remainder of its properties for the intended purpose of timber harvesting. The company continues to pursue discussions on this possible transaction with the Federal and California State governments.

Also, after years of infringement by the Federal Government of Pacific Lumber's right to use its property for the only economic activity for which the land is zoned under California State law (i.e., growing and harvesting timber), Pacific Lumber filed on May 7, 1996, an inverse condemnation suit against the Federal Government. Although the factual background is detailed, the gravamen of the complaint is straightforward, application of the Federal Endangered Species Act, 16 U.S.C. Section 1531 et seq. has taken certain portions of Pacific Lumber's property for public use without payment of just compensation. (A copy of the "OVERVIEW AND SUMMARY OF THE CASE" has been excerpted from the company's complaint and attached to this statement.)

Regardless of the course of actions on acquisition of the Headwaters Grove or on Pacific Lumber's inverse condemnation suit, the Endangered Species Act clearly needs to be reformed. Pacific Lumber and MAXXAM support the legislation, H.R. 2275, reported by the House Resources Committee to reauthorize and improve the Endangered Species Act. The Congress should continue its efforts to enact truly meaningful reform of the Act as soon as possible. The Congress should also renew the efforts to enact legislation to assure that there is effective protection against, or prompt and full compensation for, regulatory takings of private property in accordance with the property rights protections of the Fifth and Fourteenth Amendments to the United States Constitution.

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Attorneys for Plaintiffs

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

THE PACIFIC LUMBER COMPANY,)
a Delaware corporation; SCOTIA PACIFIC)
HOLDING COMPANY, a Delaware)
corporation; and THE SALMON CREEK)
CORPORATION, a Delaware corporation,)

Plaintiffs,)

vs.)

THE UNITED STATES OF AMERICA,)

Defendant.)

COMPLAINT FOR INVERSE CONDEMNATION

3

1
2 Plaintiffs' claims arise under the Fifth Amendment to the United
3 States Constitution. Jurisdiction of this court is based on 28 U.S.C. § 1491(a)(1).
4 This is a regulatory takings case.
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6

7 OVERVIEW AND SUMMARY OF THE CASE
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4

9
10 Although the factual background is detailed, the gravamen of this
11 complaint is straightforward: application of the Federal Endangered Species
12 Act, 16 U.S.C. § 1531 *et seq.* (Federal ESA) has taken Pacific Lumber's property
13 for public use without payment of just compensation.
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16
17 The Federal ESA has been applied to Pacific Lumber's property by
18 the United States Fish and Wildlife Service (USFWS), a part of the United
19 States Department of the Interior, by the federal judiciary (*Marbled Murrelet*
20 *v. The Pacific Lumber Company*, N.D. Cal. No. C-93-1400 LCB [1995]), and by
21 state agencies either acting in concert with USFWS (under a formal
22 cooperative agreement with the federal government) or applying the Federal
23 ESA because, as a federal statute, it is the supreme law of the land (U.S. Const.,
24 Art. VI, cl. 2).
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The formal agreement between California and the United States (entitled Cooperative Agreement Between The California Department of Fish And Game And The U.S. Fish And Wildlife Service, and executed by the United States June 6, 1991 and by California Aug. 28, 1991) recognizes federal decisions will control respecting federally protected species. It provides expressly:

"The CDFG [California Department of Fish and Game] agrees not to . . . issue a permit authorizing the taking of resident federally listed endangered or threatened fish, wildlife or plants . . . without prior issuance of a permit to the applicant by the Director, USFWS, except [in narrowly stated instances not pertinent here]."

Thus, without prior federal approval, California will not permit any actions that could (among other things) harm or harass a federally listed species. As alleged hereafter, California has enforced this agreement by refusing permission to harvest old growth trees unless the federal government grants its approval in the form of an Incidental Take Permit under the Federal ESA. An Incidental Take Permit is, in essence, an exception within the Federal ESA that permits moderate and unintended harm to a member of a protected species under limited circumstances.

3

Thus, the thread that binds together all of the allegations that follow is the Federal ESA. Use of that Federal statute to protect a small bird called the marbled murrelet (*Brachyramphus marmoratus*) (the Murrelet) has *de facto* condemned Pacific Lumber's old growth redwood forests to public use as a Murrelet sanctuary. In a nutshell:

- The Murrelet has been listed as a "threatened" species under the Federal ESA.
- The Federal ESA prohibits any actions that will, among other things, harm or harass a protected or threatened species.
- The U.S. District Court has found that Murrelets can only survive if they are able to nest in old growth redwood forests on the northern California coast and that the removal of any old growth redwoods would "likely" lead to the bird's extinction.
- The U.S. District Court made those findings in litigation against Pacific Lumber and they are binding on Pacific Lumber in any further proceedings.
- The California agencies that control Pacific Lumber's ability to harvest any of its redwoods

1 have concluded that, because of the impact on
2 Murrelets, no harvest of old growth redwood
3 will be permitted without USFWS approval of
4 a Habitat Conservation Plan (HCP) and
5 issuance by USFWS of an "Incidental Take
6 Permit" under the Federal ESA.

- 7
- 8 • California's application of the Federal ESA has
9 produced a classic "Catch 22" for Pacific
10 Lumber: it cannot harvest without a federally
11 approved HCP and a federally issued
12 Incidental Take Permit; but the facts already
13 found by the U.S. District Court preclude the
14 issuance of an Incidental Take Permit. By law,
15 the Secretary of the Interior can only issue an
16 Incidental Take Permit if he makes this
17 statutory finding: "the taking [of the protected
18 species] will not appreciably reduce the
19 likelihood of the recovery of the species in the
20 wild." (16 U.S.C. § 1539[a][2][B][iv].) Because
21 the U.S. District Court has already found that
22 harvesting "any one part" of an old growth
23 stand — a stand is a geographically distinctive
24 area of trees — "will degrade" the entire stand,
25 and that the loss of "any" more old growth
26 redwoods would, at best "retard" the
27 Murrelet's recovery and would more "likely"
28 cause the "extinction" of the Murrelet, the

Secretary cannot make the required finding.

Catch 22: Pacific Lumber cannot harvest any of its virgin old growth redwood without a Federal Incidental Take Permit, but such a permit cannot be issued in light of the U.S. District Court's findings.

- The U.S. District Court has confirmed its intention that its findings will preclude Pacific Lumber from harvesting its old growth timber. In an order awarding substantial attorneys' fees to the environmental organization that prevailed in the litigation, the court emphasized that its prior holding had "ensur[ed] the conservation of one of the few remaining marbled murrelet nesting habitats in California" by "permanently enjoin[ing] logging on private land to conserve the habitat of a threatened or endangered species."

8

Thus, regardless of the number of applications for use or exemption Pacific Lumber may make to either federal or state agencies, the facts already found by the U.S. District Court and the constraints built into the Federal ESA will forever prevent Pacific Lumber from using its old growth timber in any economically beneficial or productive manner.

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2 Congress has made a decision that protection of species threatened
3 with extinction is an important public undertaking. With respect to
4 protection of the Murrelet in Humboldt County, California, application of
5 that federal policy has taken Pacific Lumber's property — all of which the
6 company acquired for the purpose of harvesting — for public use. No
7 compensation has yet been paid. Hence, this suit.
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**PALCO**

THE PACIFIC LUMBER COMPANY

P.O. Box 37, Scotia, CA 95565 (707) 784-2222

COPY

February 20, 1996

Mr. Curt Smith
 Assistant Regional Director
 U.S. Fish and Wildlife Service
 3773 Martin Way, East, C-101
 Olympia, Washington 98501

Dear Mr. Smith:

RE: MARBLED MURRELET HABITAT CONSERVATION PLAN MEETING

On February 5, 1996, Mr. Henry Alden, Mr. Sal Chinnici and I met with you and members of your staff (collectively "you") to discuss a Habitat Conservation Plan (HCP) prepared by The Pacific Lumber Company (PL) for application for an incidental take permit for marbled murrelets pursuant to section 10 (a) of the Endangered Species Act for timber operations on the private timberlands of PL and its wholly owned subsidiaries. The purpose of the meeting was to discuss the viability of the HCP.

HCP FRAMEWORK

In summary, the HCP provides for an extended schedule of harvesting (over a 35 year period) on 6,648 acres of timberlands considered "occupied" by the marbled murrelet under the Pacific Seabird Group protocol. Pursuant to the HCP, harvesting should be undertaken in manner to insure that there will be no net loss of suitable habitat within a defined bioregion over time. As I explained at the meeting, the framework of the HCP was based upon years of review and research; and the maximum feasible limitation on PL's use of its timberland assets while retaining any economically productive use of its land.

We hoped and believed that the Service would endorse the plan, or at least suggest feasible alternatives or mitigations using the framework, which would allow the continued operation of our company. Unfortunately, that was not what occurred.

DISAPPROVAL

At the meeting you said that the HCP cannot be approved, because its implementation would "jeopardize" murrelets, thus precluding issuance of an incidental take permit. In other words, PL cannot get an incidental take permit and therefore cannot harvest its trees. Moreover, you said that jeopardy was "likely" since the government's Draft Recovery Plan for the murrelet specifically identified suitable habitat on PL's private timberlands as "crucial" to the recovery of the species. You also said that the areas proposed for designation of critical habitat on PL's lands should be so designated.

"Recipient of 1994 Wildlife Stewardship Award of the Forest Products Industry"

Mr. Curt Smitch
 Page 2
 February 20, 1996

While the HCP provides for no net loss of suitable habitat acreage in the bioregion, it anticipates eventual harvest of particular habitat on PL's lands. Your staff pointed out that on at least two occasions the Service has opined that the murrelet will be in "jeopardy" in a harvesting area of only 4,000 acres (in the "section 318" government timber sales) while our plan calls for phased harvesting in nearly 7,000 acres. You were concerned about the current population trend of the species, especially during the next 50 years, and suggested that if PL were to extend the harvesting schedule from 35 years to between 200 and 500 years, the HCP "might" be acceptable.

MITIGATION

You also stated that the HCP is unacceptable in that the mitigations proposed are "inadequate" to offset the impacts of the harvest schedule. You said that PL could not use development of suitable habitat on the adjacent protected public lands as mitigation. I pointed out that we do not consider this as an affirmative mitigation measure, but that is was something that would benefit the murrelet in the bioregion over time.

We also referred the group to Table 8 in the HCP for a list of the mitigation measures offered. This led to a lengthy and inconclusive discussion of just what may be considered "mitigation." You indicated that mitigation must be "fairly compensatory" of the impacts, that mitigation on an acre for acre basis is not adequate in this instance, and that we must focus on qualitative measures rather than quantitative. You said that you found our habitat model to be "astounding," that you would not accept the concept that suitable habitat can develop in less than 200 years, and that suitable habitat in the redwood region is not achieved until trees reach a diameter of 80 inches. Mr. Hensen, of your staff, went so far as to say that stands such as the Headwaters Forest are so important to the species that "the government can't just give them away." The discussion on mitigation seemed to conclude that no amount of economically viable mitigation would constitute "adequate" mitigation.

ALTERNATIVES

We then asked you to suggest economically viable alternatives to our proposal. The only alternative that was offered was a vaguely described concept, which Mr. Ken Hoffman presented. Mr. Hoffman's suggestion consisted of:

- 1) no harvesting activity within the area proposed for designation as critical habitat (nearly 33,000 acres of PL privately owned timberlands), except possibly some light thinning harvests aimed specifically at shortening the time for development of suitable habitat with the concurrence of the Service;
- 2) some selective harvesting might be applied to the "occupied" stands outside the area proposed for designation of critical habitat, followed by ten years of monitoring, the results of which could be presented to the Service for discussion of the possibility of further harvests in occupied habitat; and
- 3) an incidental take permit might be issued for the remainder of the property, which no marbled murrelets inhabit in any event.

THE PACIFIC LUMBER COMPANY

Mr. Curt Smith
 Page 3
 February 20, 1996

Mr. Hoffman said that he thought this should interest PL since it would allow harvest in what he estimated to be 15% of our "occupied" habitat, and it would avoid any issues of take in our other stands, including second growth.

This was the first time I had heard of concerns for murrelet impacts in second-growth redwood, and, such concerns appear to conflict with your staff's assertion that suitable habitat cannot grow in less than 200 years.

REVIEW AND COMMENT

Notwithstanding that there appears an insurmountable difference between our concepts of what is "acceptable," I inquired as to the procedure for formal submission of the HCP and application for the permit. Your office has sent me written instructions for submission. However, you also said that you would like to take "one more look at the problem" and get back to me by the end of that week.

In our last conversation by telephone, you indicated that you had talked with Michael Spear, the Regional Director, and it was his advice that we should go ahead and formally submit the HCP, that the Service would again comment based upon the application. We discussed the process in light of the fact that your agency has already told us the plan would not be approved.

I inquired whether such further comment must await time-consuming formal NEPA analysis and a Section 7 internal consultation, or any additional review might be completed in a shorter time frame. You said you were not sure how you would proceed, but that you thought the agency could comment in short order, during the 30-day comment period after publication in the Federal Register.

We will further consider making formal application in the coming weeks in light of your initial response to the PL HCP. I would appreciate you letting me know if there is any reason to believe that further discussion would not be futile, or if you find that any of the foregoing does not accurately reflect our conversations. Thank you for your time.

Sincerely,

THE PACIFIC LUMBER COMPANY

Thomas M. Herman (at)

THOMAS M. HERMAN
 Resource Manager

TMH:at

cc: Mollie Beattie
 Michael Spear

THE PACIFIC LUMBER COMPANY

JUN 28 1996 AT



United States Department of the Interior

FISH AND WILDLIFE SERVICE
 North Pacific Coast Ecoregion
 Office of the Assistant Regional Director
 3773 Martin Way E., Bldg. C, Suite 101
 Olympia, Washington 98501

June 25, 1996

Mr. Tom Herman
 Pacific Lumber Company
 Post Office Box 37
 Scotia, California 95565

Dear Mr. Herman: *Tom*

I am writing in response to your letter of February 20, 1996, in which you purported to summarize our meeting of February 5, 1996. At that meeting we discussed a marbled murrelet habitat conservation planning document that Pacific Lumber Company (PL) had sent to the U.S. Fish and Wildlife Service (Service) in December of 1995. As a matter of context, we note that, shortly thereafter, PL filed a lawsuit against the United States. Although recent events have prevented us from responding sooner, it has become apparent that the position outlined in your letter was intended as a predicate to the recently filed suit. We remain open to consideration of a habitat conservation plan (HCP) submitted in accordance with the Endangered Species Act (ESA). It is important, however, that we take this opportunity to set the record straight. As we have discussed with you on many occasions in the past, the presence of listed species on PL's landholdings does not preclude productive use of those lands. Section 10(a)(1)(B) of the ESA allows the Service to issue permits to take listed wildlife species incidental to otherwise lawful activities. To obtain an incidental take permit, an applicant must submit to the Service an HCP which, among other things, specifies the impacts on the listed species and its habitat of the proposed incidental take, the measures that will be taken to minimize and mitigate those impacts, and how the plan will be funded. For HCPs that will be of long duration, the Service also usually requires the applicant to submit a draft implementing agreement (IA) which sets forth in contractual terms the applicant's obligations under the HCP.

It might be useful to briefly summarize the Service's incidental take permit review process. On receipt of a formal permit application and \$25.00 filing fee, the HCP, and where appropriate the IA, the Service must complete an evaluation of the environmental impacts of the proposed take and HCP under the National Environmental Policy Act (NEPA). A 30-day period for public comment on the permit application and plan must also be provided through a Federal Register

Mr. Tom Herman
June 25, 1996
Page 2

notice, and the Service must complete an internal consultation on issuance of the permit under Section 7 of the ESA. If, on completion of the agency and public review processes, the Service determines that the proposed take will not appreciably reduce the likelihood of the survival and recovery of the species in the wild, and that the other issuance criteria specified under Section 10(a)(2)(B) of the ESA have been met, the Service will issue an incidental take permit.

I now respond to your specific contentions about our February 5, 1996, meeting. First, and very importantly, the Service did not state that implementation of PL's proposal would jeopardize the federally listed marbled murrelet. As we indicated to you at the meeting, and reiterate, while we did advise PL that removal of approximately 6,000 acres of occupied marbled murrelet nesting habitat in a key portion of the species' range, without offsetting mitigation, would raise concerns about potential jeopardy to the species, this was only a preliminary informal view based on limited information. Before the Service can reach a conclusion on the issue, it must conduct a formal consultation under Section 7 of the ESA to determine if issuance of the permit would likely jeopardize the continued existence of the species. In accordance with the process described above, this can occur only after the Service receives a permit application from PL, completes required environmental review under the National Environmental Policy Act of the effects of the proposed incidental take permit and habitat conservation plan, and circulates the plan for public review. Although you still have not even initiated the application process for an incidental take permit, we continue our willingness to discuss, either formally or informally, any aspects of a permit.

Further, the fact that the Service has recently determined that some of Pacific Lumber Company's lands, including lands within the proposed HCP area, are critical habitat for the marbled murrelet does not preclude issuance of an incidental take permit. In fact, the final rule designating critical habitat contemplates the issuance of incidental take permits in critical habitat areas and specifically provides for removal of the critical habitat designation from any lands covered by an approved habitat conservation plan. 61 Fed. Reg. 26256, 26278 (May 24, 1996)

Second, you are correct that the Service expressed concerns regarding Pacific Lumber Company's mitigation strategy. The PL proposal does not offer any mitigation whatsoever for the significant loss of habitat that will result from PL's proposed elimination of all old growth timber stands on its lands. Instead, PL proposes to rely on State Park lands to gradually make up for the 6,000 acres of habitat loss on your lands. Assuming this projection of future available habitat on State Park lands, your own biologist, Mr. Chinnici, agreed with concerns that the much younger stands on state owned lands would not, until well beyond the term of the permit, provide habitat comparable in quality to the old growth stands proposed for liquidation over the next 35 years.

Mr. Tom Herman
 June 25, 1996
 Page 3

Third, the Service did not state that suitable habitat for the marbled murrelet requires trees that are a minimum of 200 years old and 80 inches in diameter. (It is my understanding that Phil Detrich of our Sacramento Field Office contacted you soon after the meeting to clarify that the smallest known murrelet nest tree size in California is 54 inches in diameter.) What we did state is that the available data do not support acceptance of the "288 plus 6" standard adopted by PL in its habitat model as a valid definition of suitable habitat when applied to young stands of trees. We indicated instead that application of this standard could result in the identification of young stands as suitable for nesting many years before the stands include trees large enough for nesting. Pacific Lumber's planning document did not provide any data to suggest that the proffered "288 plus 6" standard has any validity when applied to young tree stands.*

Finally, you indicate dissatisfaction with the Service's failure to propose "economically viable alternatives" to your proposal at the meeting. As you acknowledge, however, that was not the meeting's purpose. The Service agreed to meet with PL for the purpose of providing you with a preliminary assessment of your habitat planning document, which we did. We remain open to meeting with you to discuss viable alternatives, and hope that PL is also interested in discussing alternatives and in working with us to creatively draft an HCP--as have other large timber owners such as Plum Creek, Murray Pacific and the State of Oregon (Elliott State Forest).

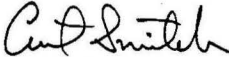
In fact, the Service did suggest that PL consider the development of a broader habitat conservation plan that encompasses not only old growth habitat but also second growth timber and residuals on PL lands and that would extend over a longer time scale. A broader, more balanced plan would allow greater flexibility in providing for continued timber harvest over the long term while at the same time minimizing impacts to the marbled murrelet as required under Section 10(a) of the Act. Attempts by PL to narrow the scope of property to be included in a proposed HCP appear motivated towards purposely defeating the HCP process, before it has even begun, and setting up the Fifth Amendment "taking" scenario raised in the litigation.

* You misquoted and clearly misunderstood Paul Henson's statement to the effect that the Service "cannot just give them away." Mr. Henson was referring to the last remnant populations of marbled murrelets - not to PL's timber lands.

Mr. Tom Herman
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In summary, our comments at the February 5 meeting were intended as an honest, if preliminary, assessment of your habitat conservation planning document in relation to the statutory criteria for issuance of an incidental take permit. Furthermore, I want to be clear that we are willing to continue discussions on PL's proposal and other alternatives and to process an incidental take permit application, should you choose to submit one. When we receive an application and the necessary NEPA and ESA reviews are ultimately completed, we will be in a position to provide a definite answer. To that end, in the interim, I want to reiterate that the Service remains committed to working with PL to assist in the development of an economically and environmentally viable habitat conservation plan that can warrant issuance of an incidental take permit.

Sincerely,



Curt Smitch
Assistant Regional Director

CS:dn:ef

cc: John G. Rogers, Director, Fish and Wildlife Service
Michael J. Spear, Regional Director, Fish and Wildlife Service


PALCO

THE PACIFIC LUMBER COMPANY

P.O. Box 37, Scotia, CA 95565 (707) 764-2222

August 8, 1996

Mr. Curt Smith
 Assistant Regional Director
 United States Department of the Interior
 U.S. Fish and Wildlife Service
 3773 Martin Way E
 Building C, Suite 101
 Olympia, WA 98501

RE: YOUR LETTER OF JUNE 25, 1996

Dear Mr. Smith:

I am in receipt of the referenced letter, written in response to my letter of February 20, 1996. I was surprised to receive a response after the passing of over four months when I had asked you to let me know if there was any hope for further discussion or if you found my description of our meeting to be inaccurate. I would have expected you to communicate any concerns promptly. Having received no response, I assumed you did not feel further discussions would be productive and that you did not disagree with my documentation of our meeting.

It is difficult at this late date to view your letter as a real response. Rather, it appears to be a "self-serving" attempt to create evidence for the government's use in the lawsuit filed against the United States by The Pacific Lumber Company (Pacific Lumber) in May. I did not write the letter as a predicate to the lawsuit. I wrote it for the purpose of memorializing our meeting and in hopes that your agency would help us find a viable solution. You are well aware that a tremendously valuable asset of our company is at stake, and I would be remiss if I did not document our discussions. I had all those who attended the meeting with me review my letter before sending it, and I believe it to be accurate. Your effort to "set the record straight" through rewriting history four months later is disappointing.

You state that your agency is open to consideration of an HCP that complies with the ESA, and you urge Pacific Lumber to apply for an incidental take permit. Your letter claims that you are committed to working with us to find a solution and that your agency will be cooperative. I believe that you personally would like to pursue those objectives, but in the three or so years that we have been diligently working to find a proposal that even remotely strikes your agency's interest and retains economic use of the lands, it appears clear that such help and cooperation from your agency is not forthcoming and that a marbled murrelet HCP on our land would never be approved. For example, we asked you at our meeting to tell us what would constitute an acceptable alternative. Mr. Hoffman's scenario of allowing us to selectively cut on 15% of our occupied habitat, or as I characterize it, seven and a half cents on the dollar, was all that was offered. That constitutes the most substantive, albeit wholly unacceptable, description of a possibility that we have heard from your agency in three years of asking for suggestions. You excuse your agency's failure to suggest alternatives by saying such was not the purpose of the meeting, however, plainly implied in any discussion between the agency and project proponent is an intent to hear from the agency what will be acceptable, as your draft handbook demonstrates. As you know, delay means economic harm to our business. You can't reasonably expect us to continuously expend hundreds of thousands of dollars proposing endless alternatives without any substantive guidance on an approach that will work.

"Recipient of 1994 Wildlife Stewardship Award of the Forest Products industry"

Mr. Curt Smith
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You, yourself, have told me that with respect to the marbled murrelet and the old growth habitat on Pacific Lumber's lands, "This is a very tough one." On the basis of our experience to date, what you and your colleagues told us at our meeting in February, what we have been told by the Federal District Court, and what we read in the regulations, including the recently finalized designation of critical habitat for the marbled murrelet, we are led to the conclusion that applying for an incidental take permit would be a wasteful exercise.

In order to issue an incidental take permit, the Secretary is required to find that "the taking will not appreciably reduce the likelihood of the survival and recovery" of the marbled murrelet in the wild. (16 USC §1539 (a) (2) (B) (iv)) Yet the United States District Court for the northern District of California has stated that harvesting "any... significant portion of the marbled murrelets' critical nesting habitat in southern Humboldt County will result in a high probability that the remaining population of marbled murrelets in this region will become extinct." (Marbled Murrelet v. Pacific Lumber Company 880 F.Supp. 1343, 1366 (ND Cal. 1995); affirmed sub nom Marbled Murrelet v. Babbitt 83 F.3d 1060 (9th Cir. 1996))

Furthermore, the U.S. Fish and Wildlife Service (Service) has raised the spectra of such dire consequences for even less intense land use projects. A case in point is the very recent administrative proceeding before the Board of Forestry in which Pacific Lumber proposed a plan which simply extended an existing road into the Headwaters Forest for approximately a half mile, removing no more than ten to twenty trees per acre (for no more than eight acres). The Service announced that even this minimal project would adversely affect the murrelet population for years to come, increasing the rate of predation within an area of remaining habitat many times larger than the project itself. Specifically, the Service informed the Board that,

"The Service believes that the proposed THP will further impair the ability of murrelets to find limited nest sites and breed successfully...

Nesting habitat within a reasonable flight distance of the coast is already limited in southern Humboldt County; thus, available sites for successful nesting are probably limited as well. In addition, an increase in nesting density can be expected to further increase the likelihood of predation, because the predators can find more prey without increasing their search effort.

Therefore, the Service believes that further removal of nesting habitat will limit the ability of the marbled murrelets to find suitable locations for successful nesting..."

The Government has again recently reaffirmed the importance of preserving our old growth based on its belief that there are not adequate, alternative nesting opportunities in this portion of the marbled murrelets' range. Under the ESA, no incidental take permit (nor any Federal permit) may be approved if it would result in even "adverse modification" of habitat designated critical. (16 USC §1536 (a) (2)) The Service made this same point when publishing the regulations governing issuance of incidental take permits:

"The Service agrees... that since all incidental take permit applications will be subject to Section 7 (a) (2) consultation, they would not be approved if they resulted in the destruction or adverse modification of the critical habitat of a listed species." (50 Fed. Reg. pg. 39685, Vol. 50, No. 189, Sept. 30, 1995)

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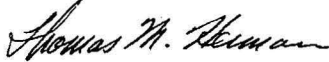
In this case, as you well know, some 33,000 acres of Pacific Lumber timberland has now been so designated. As a commercial timber products company, Pacific Lumber is in the business of conducting what the Service has declared to be "adverse modification" of habitat for murrelets.

In short, it is simply impossible for us to make economically viable use of the property you have designated as "critical habitat" without doing what your agency and the courts have determined is "adverse modification."

If I am misinformed in these respects, I would appreciate a detailed, supported, analysis explaining your position on these points.

Sincerely,

THE PACIFIC LUMBER COMPANY



THOMAS M. HERMAN
Resources Manager

TMH:at

THE PACIFIC LUMBER COMPANY



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